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SUPREME COURT OF THE UNITED STATES.

No. 143.

HENRY Z. CHAPMAN, HEMAN ELY, EXECUTOR OF CHARLES A. ELY, DECEASED, LOUISE C. ELY, AND WILLIAM A. ELY, BY LOUISE C. ELY, HIS GUARDIAN, APPELLANTS,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF DOUGLAS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED NOVEMBER 11, 1879.

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1 Pleas had in the circuit court of the United States for the eighth judicial circuit and district of Nebraska, at its court-room in Omaha, Nebraska, at the term of May, 1879.

Present, Hon. Samuel F. Miller, associate justice of the Supreme Court of the United States.

Be it remembered that heretofore, to wit, on the 10th day of September, A. D. 1877, Heman Ely, Louise C. Ely, William A. Ely, and Henry Z. Chapman, filed in said circuit court their bill of complaint against The Board of County Commissioners of the county of Douglas, in the State of Nebraska, which said bill is in words and figures following, to wit:

2 *Bill of complaint.*

UNITED STATES OF AMERICA,
District of Nebraska, ss:

In the circuit court for said district.

HEMAN ELY, LOUISE C. ELY, WILLIAM A. ELY, and Henry Z. Chapman,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE county of Douglas, in the State of Nebraska.

To the judges of the circuit court of the United States for the district aforesaid:

Your orators, Heman Ely, executor of the last will and testament of Charles A. Ely, deceased, and Louise C. Ely, widow of said deceased, and William A. Ely, heir and devisee of said deceased, by Louise C. Ely, his guardian, all of Elyria, in the county of Lorain, in the State of Ohio, and who are citizens of the said last named State; and Henry Z. Chapman, vendor of said Charles A. Ely, who joins in this suit for the benefit of the legal representatives of said deceased, of Chattanooga, in the State of Tennessee, and who is a citizen of said last named State, bring their

3 bill of complaint in equity against the County of Douglas, in the State of Nebraska, and The Board of County Commissioners of the said county of Douglas, by whatsoever name said county and the corporate authorities thereof may be known and ought to be sued, to compel said county and the corporate authorities, to surrender to or for your orators all that tract or parcel of land and real estate, situate in said county of Douglas, and described as follows, to wit: The northeast quarter of section number twenty-nine (29), in township number fifteen (15) north, of range number thirteen (13) east, of the sixth (6) principal meridian; also all that other tract or parcel of land and real estate situate in said county, and bounded and described as follows, to wit: Commencing at the northwest corner of the southeast quarter of section number three (3), in township number fourteen (14) north, of range number thirteen (13) east, of the sixth principal meridian; running thence east five (5) chains, thence south twenty (20) chains, thence west five (5) chains, thence north twenty

(20) chains to the place of beginning, and containing ten (10)
4 acres of land, more or less; and also to compel said county and the corporate authorities thereof to reconvey, release, and discharge to or for your orators, as the court may direct, all the right, title, interest, estate, claim, and demand which said county or said authorities acquired or derived under or by virtue of a certain deed of conveyance, made, executed, acknowledged, and delivered by the said Henry Z. Chapman, and Emeline C. Chapman, his wife, to said Douglas County, on or about the fifth day of March, A. D. 1859, and purporting to convey to said Douglas County the land and real estate hereinabove described, which said deed was afterwards, to wit, on or about said fifth day of March, A. D. 1859, recorded in the records of said county, in book of the deeds thereof, at page 516 of the same, a copy of which said deed is annexed to this, your orator's bill of complaint, marked Exhibit A, and made a part thereof, as fully as though set out herein; and to compel said county, and the authorities thereof, to make and render an account of the rents, issues, and profits of said land, since the making of said deed of conveyance;
5 and to pay over to or for your orators, under the direction of the court, such sum as may be found to be the balance of such account; or in case said county of Douglas and the corporate authorities thereof shall elect and request to be allowed to retain and hold the land above described, then and in that case, to compel said county, and the authorities thereof, to pay to or for your orators, as the court shall direct, the reasonable price and value of said land as stated in said deed of conveyance, with lawful interest thereon, from the date of said deed to the time of the making of such payment.

And thereupon your orators complain and say:

I. That the material facts upon which they bring this bill are, to the best of their knowledge, information, and belief, respectively, as follows, that is to say: That on and prior to said fifth day of March, A. D. 1859, the said Henry Z. Chapman was the owner, in his own right, in fee-simple, of the premises above described, and every part thereof, and that
6 he still remains such owner, except so far as he has parted with the title thereto, under and by virtue of the deed of conveyance above described, and by virtue of the sale and transfer to the said Charles A. Ely hereinafter set forth; and that the said Henry Z. Chapman holds all the right, title, interest, estate, claim, and demand which he has, or can assert, in or to said land, or in or to the purchase-money thereof, or the notes and mortgage hereinafter described, for the sale, use, and benefit of the executor or other proper legal representative of said Charles A. Ely, deceased, and joins in this suit solely to assert and maintain the same for the use and benefit aforesaid.

II. And your orators further say, that on or about said 5th day of March, A. D. 1859, the said county of Douglas, acting by its board of commissioners then in office, namely, Sylvanus Dodge, James H. McCardle, and Harrison Johnson, applied to the said Henry Z. Chapman to purchase the lands aforesaid for public use—that is to say, for the purpose of establishing a poor farm, so called, thereon; and that thereupon
7 said Chapman bargained and sold said premises to said county at and for the purchase price of six thousand dollars, as specified in said deed, of which the sum of one thousand dollars was then and there

paid by or for said county to said Chapman; and thereupon said county, to secure the payment of the residue of the purchase price of said land, made, executed, acknowledged, and delivered to the said Henry Z. Chapman an instrument in writing, signed by the commissioners aforesaid for and on behalf of said Douglas County, and purporting to be a mortgage of the lands above described, to said Henry Z. Chapman, to secure the payment to him of the sum of five thousand dollars, according to the tenor and effect of four certain instruments in writing, dated at Omaha City, Nebraska Territory, March 5th, 1859, and signed by the commissioners aforesaid for and on behalf of said county, and purporting to be the promissory notes of said county, respectively, for the sum of eleven hundred dollars in one year after date, twelve hundred dollars in two years after date, thirteen hundred dollars in three years after date, and fourteen hundred
8 dollars in four years after date, and copies of which said notes, marked Exhibit B, and of said mortgage, marked Exhibit C, are hereto annexed and made part of this bill of complaint.

III. And your orators further say, that at the time of the making and delivery of said notes and mortgage, it was mutually believed, both by said commissioners and said Chapman, that said county had full power and authority to purchase said lands, and to execute for the unpaid part of the purchase-money thereof, the notes and mortgage above described, and that all the actings and doings, both of said commissioners, on behalf of said county and of said Chapman in that behalf, were had, made, and done in perfect good faith and for good and sufficient considerations, in all things conformable to good conscience and equity; and that the actings and doings of said commissioners on behalf of said county in the purchase of said lands, and the giving of said notes and mortgage for the unpaid part of the purchase-money thereof, amounted in fact to a representation and assertion on the part of said county by its corporate authorities that said
9 county had the power and authority under the law to make said purchase and give said notes and mortgage, and that said Chapman, relying upon and believing in the existence of such power and authority so asserted and represented, as aforesaid, and in such relation, made said deed and received said notes and mortgage, which he would otherwise not have done.

IV. And your orators further say, that soon after said purchase the said County of Douglas, by its corporate authorities, entered upon and took actual possession of the premises aforesaid, and every part thereof, and thence hitherto have continued to occupy and enjoy the same, and are still in the possession and occupancy thereof.

V. And your orators, further complaining, say, that afterwards, to wit, on or about the 26th day of November, A. D. 1860, the said Henry Z. Chapman, still believing said note and mortgage to be good, valid, and effectual in law, and the amount of money named therein to be well secured on said premises, for a good and sufficient consideration by
10 him then received, of and from the said Charles A. Ely, sold, assigned, transferred, and delivered to said Ely the said notes and mortgage, by the common assignments indorsed thereon respectively, as will more fully appear by reference to said notes and mortgage hereinbefore exhibited upon the copies whereof appear the assignments of the same to said Charles A. Ely aforesaid, whereby the said Charles A. Ely became

the owner in his own right of the said notes and mortgage and of the sum of money therein described, and of all the right, title, interest, claim, and demand which they represent in and to the premises aforesaid.

And your orators further say, that at or about the time of the purchase of said notes and mortgage as aforesaid, the health of the said Charles A. Ely failed, and he became insane, and that afterwards, to wit, on or about the first day of September, A. D. 1861, the said Charles A. Ely was by the probate court of the county of Lorain, in the State of Ohio, adjudged to be insane, and incapable of attending to his affairs, and that
11 the said insanity of the said Charles A. Ely, thence continued without interruption until on or about the 30th day of September, A. D. 1864, when the said Charles A. Ely departed this life, leaving him surviving the said Louise C. Ely, his widow, and the said William A. Ely, his sole child, and leaving also his last will and testament, duly made and executed before his said insanity, to wit, on or about the 19th day of March, A. D. 1856; and having a codicil appended thereto, made and executed on or about the first day of December, A. D. 1857, in and by which said will, which was duly admitted to probate in said county of Lorain, on or about the 11h day of November, A. D. 1864, the said Charles A. Ely conveyed all his estate, real and personal, to his executors therein named, upon the trusts therein specified; and also appointed the said Louise C. Ely, to be the guardian of his said child, as will more fully appear by reference to a copy of said last will, which is hereto appended, maked Exhibit D, and made a part of this bill.

12 VII. And your orators further say, that the said Heman Ely was duly qualified as the sole executor of said will, and took upon himself, under the orders of said probate court of said county of Lorain, the execution of the same, as will more fully appear by a certified copy of the letters testamentary issued to him by said probate court, marked Exhibit E, and appended hereto and made a part of this bill.

VIII. And your orators, further complaining, say, that neither the said County of Douglas nor its commissioners, nor any one for it or them, has ever paid the said sum of five thousand dollars, specified in said mortgage and said notes, nor any part thereof; and that the rents, issues, and profits of the lands hereinabove described, since said county entered into the possession and occupancy thereof, greatly exceed in amount and value the said sum of one thousand dollars which was paid by said county at the time of the making of said deed by said Chapman, and would amount upon a fair statement thereof to a large sum of money, to wit, the sum of thousand dollars.

13 IX. And your orators further say, that for many years after the making of said purchase by said county, the commissioners thereof often and freely admitted the obligation of said county to pay for said land, but on account of the unsettled condition of the finances of said county, frequently asked for and obtained indulgence and delay on the part of the representatives of the said Charles A. Ely in pressing the payment of the said sum of five thousand dollars.

X. And your orators further say, that after the making of said deed by said Chapman, and the said notes and mortgage by said county, the supreme court of Nebraska, in another case involving a similar transaction, held and decided that *that* the corporate authorities of a county in said Ne-

braska had not authority to purchase lands on a credit, or to give any such notes and mortgage as are above described, but that the same were void and of no effect as being beyond the lawful authorityof the county or its commissioners to execute; and that since the making of such decision
14 said County of Douglas, by its commissioners, has set up and alleged a want of power and proper authority to pay the sum of money which in equity and good conscience ought to be paid as the balance of the purchase price of said lands to the legal representatives of said Charles A. Ely; and said county and its commissioners have from time to time delayed and evaded said payment; resisted divers efforts of the representatives of said Charles A. Ely to obtain the payment thereof, and sometimes the said county, by its commissioners and corporate authorities, sets up and alleges that said claim is barred and cut off by the limitations established by law, and to the same end makes a variety of other inequitable and ill-founded pretenses.

XI. Whereas your orators further complain and say, that in truth and in fact said County of Douglas obtained said land from said Chapman by either the mutual mistake and misapprehension of the commissioners of said county aforesaid, and said Chapman in believing that said county had full power and lawful authority to purchase said land and make
14 and deliver valid notes and mortgage for the purchase price thereof, or if said commissioners did not, at the time of said purchase, in good faith believe that said county possessed such power and authority, then in that case said commissioners were guilty of a gross fraud and imposition practiced on said Chapman, and ought not by virtue thereof to be allowed to retain and hold said land, but should be compelled to surrender the same and account for the rents, issues, and profits thereof.

XII. And your orators further say, that ever since the said supreme court of Nebraska decided, in effect, that said notes and mortgage were void for want of authority to make the same, said county, and the commissioners and corporate authorities thereof, have been, and are, guilty of a continuing fraud in holding said land without payment of the just purchase price thereof, and ought to be deemed and held by this honorable court to be mere trustees of the legal representatives of the said Henry Z. Chapman, and ought to be decreed to account to him for the use and benefit of the said legal representatives of the said Charles A. Ely accordingly.

16 XIII. And your orators, further complaining, say that there are not, nor ought to be, any statutes or rules of limitation which can apply on the facts herein stated and set forth against your orators, and in favor of said county, to permit the corporate authorities thereof to retain, hold, and enjoy said lands without paying the fair purchase price of the same.

XIV. And your orators further say, that it is not true that they, or any of them, have at any time since the making of said purchase by said county been guilty of any laches, neglect, or delay whatsoever in the premises, but that under all the circumstances of the case they have used such diligence as might reasonably be required at their hands, and that the long continued insanity and final death of the said Charles A. Ely, as above set forth, and the non-age of his sole heir at law, and the distance between the domicile of said deceased and the said County of Douglas, and the na-

ture and intricacy of the questions of law involved, and the efforts
17 made from time to time by your orators and by their representatives to procure from said county an amicable settlement for and payment of the purchase price of said land, all form abundant excuses for the delay of your orators in prosecuting their said claim. And your orators allege and insist that it is grossly unjust and inequitable for said county, and the authorities thereof, to set up any such excuses and pretended defenses against the payment of said purchase-money, and that they ought, of common honesty and good faith, as well as according to the rules of law and of equity applicable in such behalf, either to surrender said lands to said Chapman or his legal representatives or to make payment therefor according to their undertaking and promises so to do.

XV. And your orators, further complaining, say, that since the decision aforesaid, that said notes and mortgage are void and of no legal effect, said county cannot claim to own, hold, and enjoy said lands, nor any part thereof, without thereby in law and equity admitting and confessing
18 that the said Henry Z. Chapman, for the use and benefit under the circumstances, of the said representatives of the said Charles A. Ely has, and may enforce his vendor's lien for all the unpaid purchase-money of said lands, and lawful interest thereon.

XVI. And your orators, further complaining, say, that the said County of Douglas, and the corporate authorities thereof, cannot anywise, under the rules of law and equity, disaffirm and repudiate said purchase of said lands from said Chapman, without thereby admitting and confessing that they hold, and from the making of said deed from said Chapman to them, have held said lands, and every part thereof, as trustees, for said Chapman and his assigns, and are bound on his or their request to account for the rents, issues, and profits thereof, and to convey and surrender said lands back to said Chapman, or to his proper legal representatives in that behalf.

XVII. And your orators further say, that under the circumstances of this case, said County of Douglas and its corporate authorities ought not to be allowed to assume any adverse or hostile relation to said Chap-
19 man, as the vendor of said lands, or his representatives in that behalf, without having first surrendered and returned to him or them the possession of said lands, which were taken under the representation, or mutual mistake, or fraud aforesaid; and your orators insist that said county ought to be compelled by this honorable court, either to surrender to or for your orators, the lands aforesaid, and every part thereof, and to pay to or for your orators, the rents, issues, and profits of said lands from the date of said deed from said Chapman, as the same shall appear, on an account to be taken, and stated by one of the masters of this court, after deducting therefrom the said sum of one thousand dollars so as aforesaid paid to said Chapman by the commissioners of said county, or in case said county shall devise and hath the legal power and authority now to ratify and affirm said purchase, that then and in that case, said County of Douglas and the corporate authorities thereof, should and must submit to a decree that they do pay in full, both the principal and the interest of the unpaid part of the purchase price of said lands, and ought not nor can be otherwise permitted to continue to hold, occupy, and enjoy the same.

20 XVIII. Wherefore and forasmuch as your orators are without

remedy by the strict rules of the common law, and can only have adequate relief in this honorable court of equity, they pray the process of this honorable court to compel the appearance and answer of the said Board of County Commissioners of the County of Douglas, in the State of Nebraska, but not under oath, the oaths of said commissioners to answer hereto being hereby expressly waived. And your orators also pray that this their cause may, with all convenient speed, be heard and tried, and that in case said county shall elect, and shall be permitted by this honorable court to ratify and affirm said purchase of the lands hereinabove described from said Henry Z. Chapman, then and in that case the said County of Douglas and the board of commissioners and corporate authorities thereof may be ordered, adjudged, and decreed to pay to the said Heman Ely, as the executor of the last will and testament of the said Charles A. Ely, deceased, the whole unpaid *paid* part of the principal and
21 interest of the purchase-money of said lands as hereinabove specified and set forth; and your orators further pray that in case said County of Douglas and the board of commissioners and corporate authorities thereof shall insist on repudiating and disaffirming the purchase aforesaid of said lands from said Chapman, then and in that case it may be ordered, adjudged, and decreed by the court that the said County of Douglas, and the board of commissioners and corporate authorities thereof, do hold the lands aforesaid in trust for said Henry Z. Chapman and his legal representatives in that behalf, and that they do account for the rents, issues, and profits thereof since the date of said deed from said Chapman to said county before one of the masters of this court, being credited in such accounting with the sum of one thousand dollars so as aforesaid paid by said county on account of the purchase of said lands. And that upon due report, to be made by said master of such account, the said county and the said board of county commissioners thereof do pay the balance that may appear by such account to be due on account of such
22 rents, issues, and profits to the said Heman Ely, as executor as aforesaid; and that it may also be ordered, adjudged, and decreed by the court that said County of Douglas, and the board of commissioners and corporate authorities thereof, do also thereupon reconvey by the proper deed, to be duly executed, acknowledged, and delivered to the said Heman Ely, as such executor, all the lands aforesaid and every part thereof, and do also thereupon surrender, give up, and deliver possession of said lands and every part thereof to the said Heman Ely, as such executor as aforesaid. And your orators pray that they may have such further or other relief as the nature of the case may require, and equity and good conscience approve, etc.

(Signed) E. WAKELEY,
Solicitor for Complainants.

C. C. BONNEY,
M. H. MAYNARD,
Of Counsel.

23 Attached to said bill are Exhibits A, B, C, D, and E. Exhibit B being notes for the purchase-money, and Exhibit C mortgage to secure said notes, are in words and figures following, to wit:

EXHIBIT B.

$1,100.] OMAHA CITY, NEB. TER.,
March 5th, 1859.

One year after date, for value rec'd, Douglas County promises to pay to Henry Z. Chapman, or order, eleven hundred dollars, as witness our hands.

SYLVANUS DODGE,
JAMES H. McCARDLE,
HARRISON JOHNSON,
County Commissioners of Douglas County, Nebraska Territory.

$1,200.] OMAHA CITY, NEB. TER.,
March 5th, 1859.

Two years after date, for value rec'd, Douglas County promises to pay to Henry Z. Chapman, or order, twelve hundred dollars, as witness our hands.

SYLVANUS DODGE,
JAMES H. McCARDLE,
HARRISON JOHNSON,
County Commissioners of Douglas County, Nebraska Territory.

$1,300.] OMAHA CITY, NEB. TER.,
March 5th, 1859.

Three years after date, for value rec'd, Douglas County promises to pay Henry Z. Chapman, or order, thirteen hundred dollars, as witness our hands.

SYLVANUS DODGE,
JAMES H. McCARDLE,
HARRISON JOHNSON,
County Commissioners of Douglas County, Nebraska Territory.

24 $1,400.] OMAHA CITY, NEB. TER.,
March 5th, 1859.

Four years after date, for value rec'd, Douglas County promises to pay Henry Z. Chapman, or order, fourteen hundred dollars, as witness our hands.

SYLVANUS DODGE,
JAMES H. McCARDLE,
HARRISON JOHNSON,
County Commissioners of Douglas County, Nebraska Territory.

25 EXHIBIT C.

County of Douglas to Henry Z. Chapman.

This indenture of mortgage made and executed this fifth day of March, A. D. 1859, by and between Douglas County, Nebraska Territory, by James H. McCardle, Sylvanus Dodge, and Harrison Johnson, commissioners of said county, party of the first part, and Henry Z. Chapman, of said county, party of the second part, witnesseth that the said party of

the first part in consideration of the sum of five thousand dollars to said county paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted and sold, and does by these presents grant, bargain, sell, convey, and confirm unto the said party of the second part, his heirs and assigns forever, the following described real estate, situate in Douglas County, Nebraska Territory, to wit:

The northeast quarter of section No. twenty-nine (29), in township No. fifteen (15) north, of range thirteen (13) east, of the 6th principal meridian. Also the following, commencing at the northwest corner of the southeast quarter of the southeast quarter of section No. three (3), in township fourteen (14) north, of range No. thirteen (13) east, of the sixth principal meridian; running thence east five chains; thence south twenty (20) chains; thence west five (5) chains; thence north twenty (20) chains to the place of beginning, containing ten acres of land and in Nebraska Territory: To have and to hold the premises above-described with all the appurtenances thereunto belonging unto the said party of the second part, his heirs and assigns forever. And the said party of the first part hereby covenants and agrees with the said party of the second part
26 that it will warrant and defend the title to *to* the above-described premises unto the said party of the second part, his heirs and assigns forever, against the claims of all persons whomsoever lawfully claiming the same.

The above conveyance is made and executed by and between the said parties to secure the payment of four certain promissory notes in writing, according to the tenor and effect thereof, to wit: All bearing even date herewith, and executed by the said party of the first part, and made payable to the said party of the second part, or order: one thereof given for eleven hundred dollars ($1,100), payable one year after date; one thereof given for twelve hundred dollars ($1,200), payable two years after date; one thereof given for thirteen hundred dollars ($1,300), payable three years after date; one thereof given for fourteen hundred dollars ($1,400), payable four years after date.

Now, therefore, these presents are upon this express condition, that if the said party of the first part shall well and truly pay, or cause to be paid, the said several promissory notes, each and every of them, according to the tenor and effect, this indenture to be void; otherwise of force.

In witness whereof we, James H. McCardle, Sylvanus Dodge, and Harrison Johnson, county commissioners of said Douglas County, have hereunto set our hands this 5th day of March, A. D. 1859, and the seal of Douglas County.

SYLVANUS DODGE,
JAMES H. McCARDLE,
HARRISON JOHNSON,
County Commissioners of Douglas County, Nebraska Territory.

Executed in presence of—
LYMAN RICHARDSON.

TERRITORY OF NEBRASKA,
County of Douglas, ss:

On this 5th day of March, A. D. 1859, before the undersigned,

27 a notary public in and for said county, came the above-named James H. McCardle, Sylvanus Dodge, and Harrison Johnson, county commissioners of Douglas County aforesaid, and personally known to me to the identical persons who executed the foregoing conveyance for and on behalf of Douglas County, aforesaid, and acknowledged the execution thereof to be their free, voluntary act and deed for the uses and purposes therein set forth.

As witness my hand and seal this 5th day of March, A. D. 1859.

[SEAL.] LYMAN RICHARDSON,
Notary Public, Douglas Co.. N. T.

Rec'd for record March 5th, 1859, at 5 & 15 m.
Attest. Of true copy.

THOMAS O'CONNER, *Reg.*

THE STATE OF NEBRASKA,
Douglas County, ss:

I, John R. Manchester, county clerk and ex-officio recorder of Douglas County, Nebraska, do hereby certify that the foregoing is a full and correct transcript from the records of said county as appears in mortgage record A, at page 320.

In testimony whereof I hereunto set my hand and official seal this 27th day of March, A. D. 1879.

[SEAL.] JOHN R. MANCHESTER,
County Clerk.

Said bill of complaint is endorsed as follows: No. 128 D. United States circuit court, district of Nebraska. Heman Ely, et al., vs.
28 The Board of County Commissioners of the County of Douglas. Bill of complaint. Filed Septe. 10, 1877. Watson B. Smith, clerk. C. C. Bonney, M. H. Maynard, and E. Wakeley, solicitors for complainant.

Thereupon process of subpœna was issued in said cause, and returned by the U. S. marshal duly served upon said defendant.

Thereupon afterward, to wit, on the first day of July, 1878, an answer was filed in said cause, which said answer is in words and figures following, to wit:

29 In the circuit court of the United States, district of Nebraska.

The answer of The Board of County Commissioners of the County of Douglas, defendant, to the bill of complaint of Herman Ely, executor of the last will and testament of Charles A. Ely, deceased, Louisa C. Ely, William A. Ely, by Louisa C. Ely, his guardian, and Henry Z. Chapman, plaintiffs.

This defendant now and at all times hereafter saving and reserving unto itself all manner of benefit and advantage of exception to the many errors and insufficiencies in the said bill of complaint of the said plaintiffs contained, for answer thereunto, or unto so much or such parts thereof as this

defendant is advised is material for it to make answer unto, answering, says:

I. On or about the 4th day of March, 1859, Henry Z. Chapman,
30 one of the said plaintiffs, pretended to be seized in fee of the premises in the said bill described, and pretending to be so seized, the said Chapman, of the one part, and the County of Douglas aforesaid, by its commissioners, Harrison Johnson, Sylvanus Dodge, and James M. McCardle, of the other part, entered into an agreement in writing, bearing date on the said day, whereby the said Chapman agreed to sell to said defendant, and the said defendant agreed to purchase from him the said lands, and the said defendant agreed to pay to the said Chapman therefor seven thousand dollars, in manner as follows: Two thousand dollars at the delivery to it of a deed of conveyance by said Chapman conveying said lands to this defendant in fee, and six thousand dollars in four equal payments, with interest at the rate of ten per cent. per annum until paid. The said deferred payments to be secured by a mortgage upon the premises, to be made by this defendant to the said Chapman in that behalf. The said Chapman, on his part, agreed upon the payment of the said $2,000 to make to said defendant a
31 good and sufficient deed, with covenants for title and warranty, and deliver possession of the premises to this defendant.

II. On or about the 5th day of March, 1859, the said Chapman made and delivered to this defendant his certain deed of conveyance, conveying the said premises to this defendant in fee, whereupon it was by him admitted into and has ever since held and now holds possession of said premises and every part thereof, save as hereinafter stated, and it paid to him the said sum of two thousand dollars, and *and* also made and delivered to him, the said Chapman, the instruments purporting to be a mortgage of the same lands, and four promissory copies of which are annexed to the said bill, and such purchase of the said premises was so by this defendant made for use as a poor farm, and as such it has occupied and improved them to a large amount. And this defendant admits that both the said commissioners and the said Chapman believed that the said county had full power and authority to purchase said lands and execute the said
32 notes and mortgage for the unpaid part of the purchase price, and that all the actings and doings of the said parties in that behalf were had, made, and done in perfect good faith, and for good and sufficient considerations, in all things conformable to equity and good conscience, save as is hereinafter stated; but it denies that the actings and doings of said commissioners in the giving of said notes and mortgage were or amounted to a representation or assertion on the part of the said county or its authorities that it had the power or authority under the law to make said purchase, or said notes, or said mortgage; but whether the said Chapman relied upon or believed in the existence of such power or authority, or in such relations made his said deed and received the said notes and mortgage, and that otherwise he would not have done so, this defendant does not know and has not been informed, save by the said bill, and therefore denies those allegations in the said bill in that behalf.

III. This defendant does not know, and has not been informed,
33 save by the said bill, and cannot set forth as to its belief or otherwise whether the said Chapman sold, assigned, transferred, or delivered to the said testator, Charles A. Ely, the said notes and mortgage, all or any or either of them; but if he did, this defendant denies that he

has any interest, legal or equitable, therein, or the money represented thereby, either for the use or benefit of the executors of the last will and testament of the said Charles A. Ely, or his other legal representatives or otherwise; and this defendant denies that he has any right, title, interest, claim, or demand, of, in, to, upon, or in respect of said premises, either in his own behalf or in behalf of any other party or parties.

IV. This defendant does not know, and has not been informed, save by the said bill, and cannot set forth as to its belief, or otherwise, that at or about the time of the said alleged purchase of said notes by him, the said Charles A. Ely, or at any other time, his health failed, or he became insane, or that he was by any court so adjudged to be incapable of attending to his affairs, or that he continued so insane until the 30th day of
34 September, 1864, or that he then died, leaving the said plaintiffs Louisa C., his widow, and the said plaintiff William A., his child, him surviving, or that he made a will, or that a codicil was thereto, or that they have ever been admitted to probate, or that the terms of such will were as in the said bill in that behalf alleged, or that the said plaintiff Herman duly qualified as executor thereof.

V. This defendant admits that no part of the said $5,000 has ever been paid, and that the rents, issues, & profits of said premises exceed $1,000 since it has been in possession thereof. But it denies that it ever admitted the obligation of the county to pay for said land more than it has already paid, or that on account of the unsettled condition of the finances of the county, or for any other reason, ever asked for or obtained indulgence or delay on the part of the representations of the said testator in pressing payment of said $5,000.

VI. This defendant admits that the supreme court of the State of Nebraska has decided that it was not competent for the commis-
35 sioners of a county to make notes and a mortgage upon lands purchased by them for a poor farm, to secure the payment of the purchase price thereof, and that said county has, from time to time, delayed and refused payment of the said $5,000, and resisted divers efforts of the representatives of the said Charles A. Ely to obtain payment thereof, both by reason of laches in asserting their rights, and that their rights have been barred under the statute of limitations of the State, and also by reason of other matters and things, which fully justify this defendant, as well in morals as in law, in refusing to pay the said demand. And this defendant denies that either sole'y by reason of any misrepresentation or mistake, or by reason of any fraud or imposition practiced on said Chapman, it obtained said premises, or ought not now to be permitted to retain them, or should be compelled to surrender them, or account for the rents, issues, or profits thereof, or that since the said decision of said supreme court, this defendant, or said county, has been or is guilty of any fraud in or about the premises.

36 VII. Declining all discussion of what the laws ought to be, this defendant submits that the laws do avoid the claims of the said plaintiffs, and that they cannot be heard in this court to allege the said notes & mortgage, or a title to said premises against this defendant. The sum paid by this defendant for said lands, to wit, $2,000, was the full, fair value thereof at the time of the said purchase and sale, and the amount of the said notes & mortgage was just so much in excess of

the true value thereof. This defendant is informed & believes & now here charges that the said notes and mortgage were made between the said Chapman and the said commissioners, acting in the name of said county, with the full knowledge on the part of all of them that the full & fair value of the premises had been already paid therefor by the said county, and that the agreement to give the said notes & mortgage was unjust & oppressive towards the said county, and that, in fact, they were without consideration, and that the giving thereof was induced by some
37 secret and fraudulent agreement or understanding between the said commissioners, or some of them, on the one side, and the said Chapman on the other.

VIII. The parcel of land secondly in the said mortgage described had, at the date thereof, special value by reason of the timber thereon, of which there was but little in said county, and the said parcel constituted a very large part of the consideration to be paid by the county upon the said purchase; and although the said Chapman at the time represented that he was seized of a good and indefeasible estate in the said parcel, and covenanted to warrant and defend the same against all persons whomsoever, yet after the said purchase, and after this defendant had entered into, and while it was occupying the said parcel, in certain judicial proceedings duly instituted and prosecuted against it in respect thereof, it was ascertained, declared, and adjudged that this defendant had not, nor had
38 the said Chapman prior to the said purchase from him, any right, title, interest, claim, or demand of, in, to, upon, or in respect of the said parcel, and this defendant was thereupon, and by the said judicial process, ejected therefrom. And while under other circumstances this defendant might not be heard in this court to allege these facts against its mortgage duly made, and binding its estate in law, yet the said failure of its title is a fact pertinent to be alleged against the claim herein made by the said plaintiffs, based, as it is pleaded, upon some general ground of moral right rather than upon and in opposition to the rules of the law. And forasmuch as this defendant has already paid for so much of the said premises as it took by its said purchase, and since has retained more than the same was justly and fairly worth, it submits that it ought not to be required to either surrender what it has nor pay any further sum on account thereof.

IX. On the 8th of August, 1868, the said plaintiff William A.
39 Ely, by the said Louise C., as his guardian, exhibited his bill of complaint in this court against the said County of Douglas, alleging the said notes & mortgage, and praying a foreclosure thereof & sale of said premises, which bill was, on the 19th of November following, dismissed out of this court, and so, and not otherwise. And on said day, and not before, the said plaintiffs made demand of payment of the said notes and the moneys mentioned therein. And again, on the 15th of March, 1869, the said William, by his said guardian, commenced his certain civil action in the district court of the State of Nebraska, for the said county of Douglas, alleging the said notes and mortgage, and praying that the said county be foreclosed of all equity of redemption in said premises & for a sale thereof. And to the petition therein this defendant demurred, alleging, as grounds of demurrer, the statute of limitations and the want of power in the commissioners of the county to give the said notes and mortgage, which demurrer was, upon full argument by counsel for both parties, and con-

40 sideration of the said court, sustained, and judgment entered accordingly. And afterwards, on the 31st of December, 1871, the said cause was finally dismissed out of the said court at the costs of the said plaintiff. Thereafter the said plaintiffs appealed to the commissioners of said county to compromise their said claim by the payment of some part thereof, but this defendant would not nor has it entertained such applications, or asked the said plaintiffs or any of them not to prosecute their action or actions for the recovery of the said premises, or the moneys represented by said notes & mortgage, or in any way directly or indirectly recognized or admitted the validity or justice of the said claim, or any part thereof. On the other hand, it has always been ready to answer thereto in any court of competent jurisdiction in respect thereof, without delay or evasion. And this defendant denies that the delay of the said plaintiffs to exhibit this bill has not been caused by any intricacy or difficulty in the questions involved in their said claim, or any incapacity or inability
41 of any of the parties to know or assert their rights, and all allegations in the said bill contained in that behalf are untrue, and this defendant now here emphatically denies each & every thereof.

X. And this defendant insists that the said plaintiffs, all or any or either of them, ought not to have or maintain their said bill of complaint against this defendant, because, as appears thereby, it did not at any time within five years next before they did exhibit the same, undertake or promise in manner or form as the said plaintiffs have thereof complained against it; and further, this defendant insists that the said plaintiffs, all or any or either of them, ought not to have or maintain their said bill of complaint against it, because, as thereby appears, it did not at any time within ten years next before they exhibited their said bill, undertake or promise in manner or form as they have thereof complained against it, nor become seized of the said lands, or the title thereto. And further, this defendant insists that from the time a cause of action of such form
42 as the said plaintiffs have in their said bill alleged, to the time when they exhibited their said bill, the full period of fourteen years elapsed, during which time the evidences of the fraudulent, corrupt, oppressive, and unjust contract of purchase have disappeared; the commissioners who made said contract on behalf of said county have long since gone out of office; the said Chapman has removed from this State, and has no property therein, and is insolvent, so that no recovery can be had against him by this defendant upon his covenant of warranty; and this defendant denies that the said testator of the said plaintiffs took or held the said notes from the said Chapman for a valuable consideration, without notice of the matters hereinbefore alleged against them; wherefore, and by reason of the latches of the said plaintiffs in exhibiting their said bill, at a day so long after their alleged cause of action accrued to them, this defendant insists that they, or any or either of them, ought not to have or maintain their said bill against it. And this defendant denies all unlawful combination & confederacy in the said bill charged, without that any
43 other matter or thing material or necessary for it to make answer unto and not herein or hereby well or sufficiently answered unto, confessed or avoided, traversed or denied, is true to the knowledge or belief of this defendant, all which matters and things this defendant is ready to aver, maintain, & prove, as this honorable court shall direct, and humbly

prays to be hence dismissed, with his reasonable costs & charges in that behalf most wrongfully sustained.

J. C. COWIN,
Sol. for Def'ts.

J. M. WOOLWORTH,
Of Counsel.

Upon the back of said answer appear endorsements in words and figures following, to wit: No. 128 D. In United States circuit court, district of Nebraska. Douglas County ads. Herman Ely, etc., et al. Answer. J. C. Cowin, sol. for def'ts. J. M. Woolworth, of counsel. Filed July 1, 1878.

WATSON B. SMITH, *Clerk.*

44 Thereupon afterwards, to wit, on the 18th day of January, 1879, a replication was filed in said case, which said replication is in words and figures following, to wit:

In the circuit court of the United States in and for the district of Nebraska. In equity.

HEMAN ELY AND OTHERS
vs.
THE BOARD OF COUNTY COMMISSIONERS OF the County of Douglas et al.

The replication of Heman Ely and all the other plaintiffs to the answer of The Board of County Commissioners of the County of Douglas, defendant.

These repliants, saving and reserving unto themselves, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver, maintain, and prove the said bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants; without this that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true. All of which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said bill of complaint they have already prayed.

C. C. BONNEY,
H. H. MAYNARD,
E. WAKELEY,
Solicitors for Plaintiff.

45 Said replication is endorsed as follows: No. 128, doc. D. U. S. circuit court, district of Nebraska. In equity. Heman Ely and others vs. The B'd of County Com'rs of Douglas Co. Replication. Filed January 18, 1879. Watson B. Smith, clerk.

Thereupon afterwards, to wit, on the 1st day of February, 1879, a stipulation was filed in said case, which said stipulation is in words and figures following, to wit:

In the United States circuit court, district of Nebraska.

HEMAN ELY ET AL.
vs.
THE BOARD OF COUNTY COMMISSIONERS OF the County of Douglas.

It is hereby stipulated and agreed by and between the parties in this cause, that on the final hearing thereof the following records and papers may be read without formal proof of the execution thereof, subject to exception for impertinence, immateriality, or irrelevancy, namely: Exhibits annexed and referred to in the bill, marked A, B, C, D, E. The contract of sale of the premises in question between the plaintiff Chapman and the defendant, the record of the proceedings in ejectment whereby a certain part of the premises mentioned in the bill are in the answer alleged, and the records of the several proceedings had by or on behalf of the plaintiffs against the defendant upon the mortgage in the bill alleged.

Dated Omaha, January 31, 1879.

J. M. WOOLWORTH,
Of Counsel for Def't.
E. WAKELEY,
Sol. for Complainant.

46 Said stipulation is endorsed as follows: No. 128 D. U. S. circuit court, district of Nebraska. Heman Ely et al. vs. The B'd of Co. Com. of Douglas County. Stipulation. Filed February 1, 1879. Watson B. Smith, clerk.

Thereupon afterwards, to wit, on the 14th day of May, 1879, depositions were filed in said cause, which said depositions are in words and figures following, to wit:

Deposition of Henry Z. Chapman, witness for plaintiff in the above cause, taken upon interrogatories under a dedimus potestatem before C. R. Gaskill and R. M. Barton, jr., com'rs, at the office of R. M. Barton, jr., at Chattanooga, in said district, on 22nd day of March, 1879. Present, only Henry Z. Chapman, the witness.

1st interrogatory propounded by complainants. State your name, age, residence, occupation, and how long you have resided in your present place of residence, and whether you ever resided at Omaha, in the State of Nebraska, and if yea, how long, and when did you reside at Omaha?

Ans. My name is Henry Z. Chapman; age, forty-nine; present residence, Chattanooga, Tennessee; I came here about eight years ago; b been absent from here part of the time since then, but have all the t regarded this as my residence, and am now here all the time. I am ... gaged in the livery business at present. I did at one time live in Omaha,

in Nebraska; I resided at Omaha a part of 1857, and 1858, and part of 1859.

2nd interrogatory by complainant. Did you know Harrison Johnson, Sylvanus Dodge, and James McCardle, county commissioners of the county of Douglas, in said State of Nebraska, in March, 1859?

Ans. Yes, sir.

3rd int. (by same). State whether you sold and conveyed to said county of Douglas or to its board of county commissioners any lands situate in said county, in March, 1859.

Ans. I did.

4th int. (by same). If you have answered the last interrogatory in the affirmative, you will now state the particular' of such sale; the de-
48 scription of the land; the price at which the same was sold; the am't paid down, if any; the amount of deferred payments, if any; how such deferred payments, if any, were to be made; how such deferred payments were secured, if secured at all.

Ans. I sold them one body of one hundred and sixty acres in Douglas County, lying about one mile west or southwest from the then capitol. I also sold them one tract of about ten acres of wood land, some three or four miles, I think, from the other, and lying, as I recollect, in Douglas County. About this last tract there was some question about the title, but this was known to the commissioners, who had a lawyer to examine the title. The price for all the land was six thousand dollars. The amount agreed to be paid down was one thousand dollars, and this was paid me in county warrants.

The balance was secured by notes with mortgage on the same land. The notes were due and payable, as follows: One for eleven hundred dollars, due one year after date, which was March 5, 1859, the date of the transfer; one for twelve hundred dollars ($1,200), due two years after that date, and one for thirteen hundred dollars ($1,300.00), due three years after date; one for fourteen hundred dollars, due four years after date, all dated March 5, 1859, the date of the sale.

5th int. (by same). State whether any separate price was agreed upon for the separate parcel. If yea, what was the price of each; also state whether such price or prices were fair and reasonable prices for the said lands, and whether such sale was made by you in good faith, and particularly whether there was any secret agreement or understanding between you and the said commissioners, or any one or more of them, that you were to be paid any unfair or excessive price for said lands; and if so, state the same fully. If your agreement with the county commissioners for said sale was in writing
49 state the fact, and annex a copy if in your power, and if not, state if you know when such copy may be obtained, with all the facts in that behalf.

Ans. There was no separate price agreed on for the separate tracts. I considered the price agreed on a fair and reasonable price. The sale was made by me in good faith. There was no secret agreement made or had by me or for me with the commissioners, or any one of them, or any one for them, about the sale, nor was there any agreement with any one for me for the excessive price. On the contrary, legal advice was had both by me and by the commissioners as to their right and authority to make the trade. I gave, as I recollect, a written deed, and

they executed the notes and mortgage which constituted the trade. I have neither the mortgage, notes, nor copy of the deed. Copies can be obtained of the executor of C. A. Ely or from the county records of Douglas County, I having transferred the notes and mortgage to C. A. Ely.

6th int. (by same). State how the down payment, if any, was made, and if in county orders at what rate did you receive them, whether at their face value or otherwise; and if otherwise, did you receive them at their full and current value or at a greater or less value; answer fully.

Ans. The down payment was made in county orders or warrants, and I took them at fifty cents on the dollar, receiving two thousand dollars in warrants, making the one thousand dollars payment. At the time I took them they had little or no current value, that is, few persons were buying them; they were only used in paying taxes; their current or market value was from twenty-five to twenty-eight cents probably. I took them at greater than there real value at the time, but I thought they were good and worth what I gave for them as an investment.

7th int. (by same). If you have stated that you took notes and
50 mortgage for the deferred payments, state now what you did with those notes and that mortgage.

Ans. On the 26th of November, 1860, believing said notes to be good and valid, and worth their face value, I sold, assigned, and transferred and delivered them to Chas. A. Ely for a valuable consideration.

8th int. (by same). If in reply to your last interrogatory, you have said that you sold and assigned the notes and mortgage to Chas. A. Ely, state when and where said sale was made, what was the consideration thereof, the value of such consideration if other than money, whether the same was made in good faith, and whether you or said Ely at that time had any notice or knowledge that the county defendant claimed to have any defense thereto, and if so, state fully what notice or knowledge thereof you and said Ely or either of you had at the time of your sale to him.

Ans. The sale was made on or about the 26th day of November, 1860, in Elyria, Lorain County, Ohio, the residence at that time of both myself and Ely. The consideration given me was the full face value of the notes and interest. I got money and land. The trade was in good faith; neither Ely nor myself at that time had any notice or knowledge of any defence the county had to said claim, or that it claimed to have any.

9th int. (by same). Were you made a party complainant in this cause with your consent; if so, what purpose?

Ans. I consented to be a party in order that Ely might obtained all the rights and benefits I had in the mortgage and notes. I am not to receive any benefit from it myself.

10th int. (by same). Do you know or can you set forth any other matter, or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the sub-
51 ject of this your examination on the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Ans. I think it was in the year 1865, that I, as the agent of the executor of C. A. Ely, went to Omaha, and there made a proposition to the then acting commissioners of Douglas County, offering to relinquish their

notes and mortgage, if they would deed back the land to Ely's ex., which they refused to do, and they said they would call a meeting while I was there, and see what could be done towards paying the notes, but this they did not do; I was there some three weeks. I do not know of anything further material to this suit.

HENRY Z. CHAPMAN.

52 Deposition of Heman Ely, taken before W. L. Fay and H. M. Redington, March 29, 1879, a dedimus potestatem issued in said case.

HEMAN ELY, of the county of Lorain, Ohio, of lawful age, being first duly sworn by us as hereinafter certified, deposes as follows, to wit:

Ques. 1. State your name, age, residence and occupation, and how long have you resided in your present place of residence.

Ans. Heman Ely; was born in Elyria, Lorain County, Ohio, October 30th, 1820, and have from that date to the present time been a resident of Elyria; occupation, a dealer in real estate.

Ques. 2. Did you know Charles A. Ely, of Elyria, Ohio? If yea, state his relationship to the parties complainant in this cause.

Ans. I did know Charles A. Ely, of Elyria; he was my half brother, having the same father; he was the husband of Louise C. Ely, the father of William A. Ely, and no relation of Henry Z. Chapman.

Ques. 3. Is the said Charles A. Ely now living? If not, state the date of his death, where he died, and how long he was sick immediately previous to his death, and the nature of his sickness; state fully.

Ans. Charles A. Ely is not living; he died at Longview Insane Asylum, near Cincinnati, Ohio, Sept. 30, 1864. He became insane in the latter part of the year 1861, and was placed in the insane asylum at Newburgh, Cuyahoga County, Ohio, where he remained about two years, he was taken to Longview asylum, where he remained until his death.

Ques. 4. If you have answered that the said Charles A. Ely is now dead, state where his residence was at the time of his death, whether he had any family, and if yea, what number thereof survived him, if any, and where such surviving members, if any, have resided since the death of said Charles A. Ely, and where they now reside.

53 Ans. His residence at the time of his death was Elyria, Ohio. His family consisted of his wife, Louise C. Ely, and a son, William A. Ely, two of the complainants in this case, who since his death and now reside at Elyria.

Ques. 5. State whether before or since the death of the said Charles A. Ely you occupied any official or fiduciary position or relation towards him or towards his estate. If yea, what relation?

Ans. On the 14th day of April, A. D. 1862, I was, by Charles H. Doolittle, judge of the probate court of Lorain County, appointed guardian of Charles A. Ely, which relation I held until after his death, when, on the 16th day of November, A. D. 1864, I was, by Charles H. Doolittle, judge as aforesaid, appointed executor of the estate of said Charles A. Ely, under a will executed by him before his insanity.

Ques. 6. If you have answered that you was guardian of said Charles A. Ely before his death, or executor of his estate after his death, please state whether, as such guardian or executor, you at any time became pos-

sessed of the notes and mortgage described in the bill of complaint in this cause, viz, four notes signed by Sylvanus Dodge, James H. McCardle, and Harrison Johnson, county commissioners of Douglas County, Nebraska, dated at Omaha, March 5, 1859, for $1,100, $1,200, $1,300, $1,400, respectively, payable to Henry Z. Chapman, and secured by a mortgage executed by the same commissioners upon certain lands in said county? If yea, state when and how you became possessed of the same, and what, if anything, you did to collect the same? If you had any negotiations with said commissioners, personally or by letter, state the facts, and annex to your depositions copies of all letters sent and all letters received, if any were sent or received. If you are unable to annex such copies or such letters received, state why you are unable to do so. If you state that the same are lost or destroyed, state upon your best recollection the contents
54 thereof. State fully all the facts as to what you did by way of negotiations or otherwise in the endeavor to collect said notes.

Ans. 6. The notes and mortgage mentioned in this interrogatory were in my possession; they came to me with all the effects of Charles A. Ely at the time he became insane. I had correspondence with the commissioners of Douglas County respecting the payment of the notes mentioned, and I think on one or more occasions I employed Henry Z. Chapman, when he went to Omaha, to endeavor to effect an arrangement with the commissioners. In March, 1873, my office in Elyria was burned, with most of its contents, including all my correspondence, as well as all the books of account relating to my brother's business, all of which were in a safe supposed to be fire-proof, but which proved not to be so. For this reason it is impossible for me to produce originals of any letters written by me to the commissioners of Douglas County, or received by me from them, or any correspondence with other parties previous to the burning of my office, as above mentioned. In July, 1866, this claim was placed in the hands of Myron R. Keith, of Cleveland, Ohio, for collection, who, as I am informed, employed George B. Lake, esq., or Lake and Brown, of Omaha, to prosecute it. Nothing having been collected on the claim, on the fourth day of May, 1870, I delivered to Louise C. Ely the original notes and mortgage above mentioned, to be by her placed in the hands of M. H. Maynard, of Marquette, Michigan, for collection, who since that time has had the matter in charge.

Ques. 7. Do you know, or can you set forth, any other matter or thing which may be of benefit or advantage to the parties at issue in this
55 cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Ans. I know of nothing further that will be of benefit to the parties at issue in this cause, or either of them, except that I have received from E. Wakeley, esq., a letter written by me to him, dated August 29th, 1871, in which I say, previous to my brother's death, after he became insane and after I was appointed his guardian, I wrote to the commissioners of Douglas County, copy of which letter and copy of reply I also inclose herewith. Said copies attached, marked Exhibit A and Exhibit B.

HEMAN ELY.

Attached to said deposition is Exhibit A.

(Copy:)

ELYRIA, OHIO, *Jan'y* 7, 1864.

COMMISSIONERS OF DOUGLAS COUNTY, *Omaha, Nebraska:*

GENTS: I hold as guardian for my brother, Chas. Arthur Ely (now insane), four notes given by com'rs of Douglas County to Henry Z. Chapman, dated March 5th, 1859, secured by mortgage, one for $1,100, payable one year after date, one for $1,200, payable two years after date, one for $1,300, payable three years after date, and one for $1,400, payable four years after date, all now past due.

I am quite anxious to close up all my brother's accounts at as early a day as possible, and will be obliged if you will inform me whether provision has been made for the payment of said notes, or any portion thereof, and if not whether provision will be made for payment, and at what time.

Very respectfully yours,

HEMAN ELY.

56 (Copy.)

Exhibit B attached to the foregoing deposition.

COUNTY CLERK'S OFFICE, DOUGLAS COUNTY, N. T.,
Omaha, Feb'y 6, 1864.

HEMAN ELY, Esq., *Elyria, O.:*

DEAR SIR: Your favor of the 7th Jan'y was duly rec'd, and in reply I am directed to say that at present there is no provision made for the payment of the notes referred to.

We could not issue warrants on the treasury in payment of the notes for the reason that the amount authorized to be issued each year is limited. The only thing we could do would be to submit a proposition to the voters of the county to levy a special tax to pay your demands. We have within two years past got permission by vote of the people to levy special taxes to pay some claims similar to yours, but the creditors made literal concessions from the amount of their claims to induce the people to vote the tax.

If you have any proposition of this kind to offer, we will receive and act upon it, and do the best we can for you.

By order of the board of commissioners:

BYRON REED,
County Clerk.

57 In the circuit court of the United States for the district of Nebraska.

HEMAN ELY ET AL.
vs.
THE BOARD OF THE COUNTY COMMISSIONERS OF the County of Douglas. } In equity.

Testimony taken before Mr. Homer Stull, an examiner in equity for the circuit court of the United States for the district of Nebraska, at Omaha, commencing on the 27th day of March, 1879.

Present, E. Wakeley, esq., and M. H. Maynard, esq., for complainants, J. M. Woolworth, esq., for respondents.

HARRISON JOHNSON, a witness called on the part of complainants, being by me first duly cautioned and sworn, testified as follows, viz:

Q. State your name.
A. Harrison Johnson.
Q. Your residence.
A. It is three miles from Omaha, on a farm.
Q. How long have you resided in this county?
A. Since 1854.
Q. State whether you held any official position in the county in 1859.
A. I did.
Q. What was it?
A. One of the county commissioners.
58 Q. How long did you hold that office?
A. Three years.
Q. During what years?
A. I think 1859 was the last year.
Q. They were elected annually at that time?
A. No, sir; they were elected for three years.
Q. Did you serve two terms?
A. No, sir.
Q. Who were the other commissioners during your term?
A. J. H. McCardle and Mr. Dodge.
Q. Do any of these commissioners reside in the county?
A. Mr. McCardle does.
Q. Is Mr. Dodge alive?
A. He is dead.
Q. State whether the board during your term purchased a poor farm.
A. They did.
Q. State what was done by the board with reference to that matter; go on and tell without question.
A. In the winter of 1858 and 1859 there was a number of applications made to the county commissioners to take charge of the poor. We had no place to take them, and as then began to discuss the propriety of purchasing a piece of land near the city for a poor farm. A number of propositions to sell land were furnished to the commissioners. After carefully considering the matter we purchased a tract of land from Mr. Henry Z. Chapman.
Q. Would you recognize the description of the land? Was it the N. E. ¼, sec. 29, town. 15, range 13?
A. Yes, sir.
Q. And ten acres in S. E. ¼, sec. 3, town. 14, range 13?
A. Of timber, yes, sir.
59 Q. What was the arrangement with Mr. Chapman?
A. To the best of my recollection, we were to give him six thousand dollars for the farm, one thousand down in county warrants at fifty cents in payments. I cannot swear whether they were annual payments.
Q. Do you recollect how those payments were divided?
A. No, sir; I do not recollect now.
Q. Do you recollect whether they were divided so, $1,100.00 in one year, $1,200.00 in two years, $1,300.00 in three years, $1,400.00 in four years?

A. No, sir.

Q. How far is that property, the main tract, quarter section from the court-house?

A. A mile and a half, I should think.

Q. Were there any improvements on the property?

A. There was.

Q. State what they were on the quarter section.

A. A small frame house.

Q. State about the size of it.

A. I should think it was 16 by 24, some fencing posts and rails, a considerable amount of ditch; quite a large portion of the tract had been enclosed by a ditch fence.

Q. Any other improvements?

A. There was a well walled up with stone.

Q. How deep was the well, about?

A. I should think it was seventy to seventy-five feet; may be 80 feet; it was a pretty deep well.

Q. Was any of the land under cultivation?

A. Yes, sir; there was. I think about 20 acres broke on it at the time.

Q. State whether the price paid by the commissioners was considered by them to be a fair price—fair for cash value of the property.

A. It was.

60 Q. With regard to the ten-acre tract, was their any difference in the title to that property that was known to the commissioners at the time of this purchase, as to the validity of it between that and the quarter section?

(Objected to as immaterial.)

Q. I simply wish to call your attention to whether that matter was discussed by the board at all.

A. Mr. Chapman had a warranty deed for the 160 acres; my impression is that he did not have to the other.

Q. And the commissioners knew it?

A. Yes, but it was believed that they would get the title to it. I could state, if necessary, in regard to those timber tracts.

Q. Have you seen Mr. Chapman since that sale?

A. I have.

Q. How long did he reside here after the sale?

A. I don't recollect; it is several years since I saw him.

Q. Did you see him two or three years after the sale?

A. I think I did.

Q. Was there any talk about this matter?

A. There was.

Q. State what the talk was.

(Objected to as immaterial and irrelevant.)

A. It was partly in regard to the warrants that he had received and the balance of the money. I told him that I had nothing to do with the matter now.

Q. You was out of office at the time?

A. Yes, sir.

Q. You said you paid him one thousand in warrants at fifty cents. Do I understand you paid him two thousand in warrants?

A. Yes, sir.

Q. Was fifty cents on the dollar the current value of the warrants?

61 A. All the way from 30 to 50 cents on the dollar. There had been no taxes collected, and the expenses of the county was running, and we had to shin around and do the best we could.

Q. No taxes had ever been collected, did you say?

A. No, sir.

Cross-examined:

Q. Who were the other persons who offered to sell the commissioners land for the poor house?

A. Jesse Lowe was one, if I recollect right; Sam Rogers and Moffat that owned the tract down below here, I think Hanscom on his piece out here, and a man by the name of Brown up by the military road—I don't recollect his first name. I think you will find the most of those on the records. There was quite a number offered to sell; we received several letters from parties offering to sell, and ordered them put on file.

Q. That ten acres was remote, was it not, from the 160?

A. Yes, sir; it was down in the timber two or three miles.

Q. The object was to supply the poor farm with timber, was not it?

A. Yes, sir.

Q. That was the usual custom generally among settlers here at that time, to get a small tract of timber to go with the prairie.

A. If they could; yes, sir.

Q. There was not a great deal of timber in the county, was there, as compared with the pra'rie?

A. No, sir.

Q. Timber was much more valuable than pra'rie land?

A. Yes, sir.

Q. How much did you allow in the purchase of this property for the timber?

A. I don't recollect.

Q. Was not it a very much larger price per acre than the pra'rie land?

62 A. My impression is that we were made an offer for the two pieces of pra'rie and timber together; it was much less than he asked.

Q. It was a lump trade, then?

A. Yes, sir; that is my impression.

Q. What was timber land such as this worth at that time?

A. All the way from twenty-five to fifty or sixty dollars an acre, owing to what kind of timber it was.

Q. What kind of timber was on this ten acres?

A. Hard wood, mostly; there was oak, lynn, and walnut, mostly.

Q. What would you say land like that was worth, such as that was, per acre at that time?

A. That piece of land—I never was down on it but once—I should think it was worth thirty dollars an acre; some of it was pretty rough and hard to get at.

Q. The records show that this purchase was made on the 5th of March; how long before that were you negotiating with Chapman for the purchase?

A. I could not say; some time in February or latter part of January, I should think. It was in the latter part of the winter when we began to negotiate and talk up these matters.

Q. Did the county ever get title to the ten acres?

A. I don't know, sir, whether they did or not. I suppose they had, but I don't know.

Q. What improvements are on this 160 acres at this time?

(Objected to as immaterial and not cross-examination.)

A. It is enclosed with a board fence, and has a brick house on it.

Q. How large is the brick house?

A. It is a large one. I should think it cost twelve or fifteen thousand dollars. A good frame barn and a corn-crib.

63 Q. All under cultivation, is it not?

A. Yes, sir; and pasture together. There is a grove on it that is fenced off.

Q. Did they plant that grove?

A. No, sir; it was a very pretty grove when they bought it; it is a natural grove.

Redirect examination:

Q. What determined the decision of the commissioners to buy this property instead of buying some other property that was offered; anything besides price?

A. I took it on account of its location—nearness to town—and the price.

Q. Was the price more favorable than others?

A. We thought it was the best offer that we had.

Recross-examined:

Q. What land did Jesse Lowe offer to sell you?

A. It was the west part of his tract over next to the creek.

Q. How far is that from the court-house?

A. There is not much difference, a mile and a quarter to mile and a half.

Q. What land did Rogers offer to sell you?

A. He had two pieces. Davidson, his brother-in-law, or some of his connection, had a piece on the Platte, and he had some in the south part of the town.

Q. That is his pre-emption?

A. I presume so. It was brush land over towards Wilcox's.

Q. How far was Moffat's land?

A. That was still south of that about the same distance that the Chapman land was, down on the Bellvue.

Q. Was not Hanscom's an adjoining tract?

A. No, sir.

Q. How far was Brown's land.

64 A. A little further off, about two miles; it was the other side of Alex. Baker's.

HARRISON JOHNSON.

Signed in my presence.

HOMER STULL, *Examiner*.

E. WAKELEY, a witness called on the part of complainants, being by me first duly cautioned and sworn, testified as follows, viz:

Q. You reside in Omaha?

A. Yes, sir.

Q. How long?

A. Since 1867 continuously.

Q. You are the complainant's solicitor in this case?

A. Yes, sir.

Q. State whether the notes and mortgage described in the bill in this case came into your hands; and if so, how and when?

A. In July, 1871, Mr. Poppleton and Mr. Maynard came to my office and wished me to take charge professionally of a suit then pending upon the notes and mortgage, and I did so.

Q. The notes and mortgage described in the bill of complaint in this case?

A. Yes, sir; and then the notes and mortgage were placed in my hands, and they remained in my hands for a considerable time afterwards, and have been lost while in my possession.

Q. Have you made diligent search for them?

A. I have repeatedly. I have been very much annoyed that I could not find them. I have no recollection of losing any other of my papers, and I have been anxious to find them and have them filed.

Q. State what you have done in this matter; what negotiations you have had with the county commissioners, if any, preserving the order of time as nearly as may be.

65 A. When I took charge of the case the matter was pending, as I think, upon a demurrer to the amended bill in the circuit court of the United States for this district.

Q. A foreclosure bill?

A. Yes, sir; in July of that year, according to a memorandum I have, which probably was taken from the record, there was given leave to file an amended bill; my impression is that I obtained that leave, but I am not certain about it. Soon after this I instituted inquiries with Mr. Maynard and Mr. Heman Ely, one of the plaintiff's, executor of the will, to ascertain what the proof would be in regard to the alleged assignment of the notes and mortgage from the executor to the plaintiff in that suit. It is alleged in the amended bill that at a certain time the securities were assigned to the parties who brought the suit, William A. Ely and some one else. The result of my inquiries of Mr. Maynard and of Heman Ely was——

(Counsel for defendant objects to witness stating the contents of any correspondence. It is not the best evidence.)

The WITNESS. I ascertained the alleged assignment could not be proven, it being alleged by both Mr. Maynard and Mr. Ely that suit had been commenced in the name of those plaintiffs upon a misapprehension of the facts. I considered the question whether I could by amendment substitute the executor as plaintiff, and found no authority which justified me in thinking I could do that. In December, 1871, I determined to and did discontinue that suit without prejudice. Meantime I had investigated the case and considered the legal questions involved and became satisfied that there were, to say the least, serious doubts and difficulties about recovering either upon the notes or the mortgage.

66 Q. Had the Supreme Court rendered a decision in the meantime?

A. I contemplated making a visit to the East in the summer of 1872, and determined to do so and to stop at Elyria a few days on my way, that being a place where I had spent part of my boyhood, studied my profession, and been admitted to the bar, and that being the place where Heman Ely, one of the executors, resided, and whom I knew personally, and I determined not to commence further proceedings until I had seen him. I did stop and did see Mr. Ely in the summer of 1872, and had two or three different interviews with him about this claim. I stated to him——

(Counsel for defendants objects to any conversation between the witness and Ely as incompetent and irrelevant.)

I stated to him the difficulties in the way of a recovery according to my view of the case. We discussed the expediency of trying to compromise the suit.

Q. Did you advise him that you thought that a recovery by any proceeding in the courts was impracticable?

(Objected to as incompetent.)

A. I do not know whether I expressed an opinion that it would be impossible to recover, but I did express the opinion that there were serious doubts in my mind about the right of recovery arising out of the statute of limitations and out of the question of the power of the commissioners to make notes and execute a mortgage. The result of the matter was that Mr. Ely gave me authority to do whatever I thought would be best in the matter, and to make efforts, if I thought desirable, to compromise the claim with the commissioners before my return from the East, and during the summer of 1873 I had some casual talk with the commissioners, or part of them, but do not remember that I went before the commissioners

67 while in session as a board. In July, 1873, I received from Mr. Ely, in answer to some letter I had written him, a letter suggesting what he would be willing to do in the way of compromise. Soon after that—I cannot fix the time with any precision—I drew up a formal written offer to compromise the claim, which I presented the commissioners, and it was filed, or at least received in the office, and remained there until the time when Mr. Cowl gave a written opinion, which I will speak of presently, and which was in the summer of 1876. At that time I saw this paper and again read it and have never seen it since. The proposition which I submitted was in substance——

(Objected to as incompetent and not the best evidence.)

Q. State whether you have caused search to be made in the office for that proposition.

A. I have and I know from communication with the clerk he has been searching the office to find that paper, and he represented to Mr. Maynard and me as late as yesterday he has not been able to find it.

Q. State what it was.

A. It was in substance that Mr. Ely would receive from the commissioners the value of the property, with ten per cent. interest on the amount, deducting the one thousand dollars which had been paid to Chapman; that if the parties were unable to agree as to what the value was, the proposition suggested that it might be left to three persons to be selected by the parties, who would receive evidence and fix the value. There may have been

some other details in the proposition which I do not remember, but that was the substance. After that I was before the board when in session and a good many times at different intervals, sometimes several weeks and perhaps months a part, in which I urged the commissioners to take some action upon the proposition. I had a good deal of talk with
68 the board about the proposition, about what was right in the matter, and I urged upon them in substance that it was wrong in the county to keep that property and not pay for it. There was no formal action taken by the board until the summer of 1876, but in these repeated interviews we discussed the matter informally, and I can again say this, that it was never claimed in any of these conversations that the county had paid anything for this property except the one thousand dollars which was received in the form of county warrants for two thousand at 50 cents on the dollar. The commissioners never denied that it would be just and right that these parties should have their pay for the property. They gave no reasons why the county should not pay for the property except that suggestions were made by one or more of them that if the claim could not be enforced by legal proceedings, perhaps the board would not be justified in paying for the property, although it might be right for them to do so. This was the general nature of the negotiations between myself and the commissioners until the summer of 1876.

Q. State whether in any of these interviews you was given to understand by the board that they would make some provision for payment of this claim.

A. Without being able to state in terms what was said, they certainly gave me to understand, and I did understand from what they said—

(Objected to as incompetent.)

The WITNESS. That they would do what was just and right, and either accept this proposition or make some proposition of their own, or do what should be just and right in the matter. In the summer of 1876, I contemplated going away for a few weeks, as I did, to the Centennial, and this matter had dragged so long that I determined that I would bring it to a conclusion in some way, and so saw the commissioners, I think
69 two or three times that summer, and insisted upon their coming to some conclusion about the matter. Finally they said they would refer the matter to their counsel or attorney, Mr. J. C. Cowin, and get his opinion as to whether they had jurisdiction or power to compromise the suit and pay what should be right. Afterwards, in an interview with the commissioners while in session, they said Mr. Cowin had made a verbal report to the commissioners on the subject. They seemed to differ between themselves as to what the report was, one or more of them, Mr. McCardle certainly, saying that Mr. Cowin advised the board that they had power and jurisdiction to compromise the claim and pay what was right, if they saw fit to pay it. One of the commissioners said he understood Mr. Cowin to say that they had no right to do it. I suggested they should get Mr. Cowin's written opinion, which they consented to do, and either of my own motion or at their request I drew up a paper propounding to Mr. Cowin certain inquiries which appear of record, which I saw there the other day, and therefore I don't need to state them. After seeing Mr. Cowin several times and urging him to send in his opinion, and meeting with considerable delay, I succeeded at last in getting him to send to the commissioners

a written opinion as to the questions which had been submitted by me. That opinion I saw and read, and it is one of the papers which the clerk has been looking for, and which he has so far assured me he could not find. After this written opinion had been filed I had a final interview with the commissioners at their office while in session, and the result was that two of the commissioners stated that inasmuch as they were advised or thought that the county could not be compelled by law to pay the claim, that they would not feel justified in paying anything to compromise; as the trustees of the public, they thought they would not be justified in doing it. Mr. McCardle did not coincide with that view, and
70 thought the county should pay whatever was just and fair. That being the opinion of the commissioners, I ceased my negotiations with them. That was in the summer of 1876.

Q. After your return from the Centennial?

A. No, sir; before, according to my recollection. I would not be absolutely certain whether it was before or immediately after my return; it must have been in the summer or fall of 1876, I think. I informed Mr. Ely or some of the parties concerned of the final failure, and was undecided what to do about it. One plan in my own mind was, when the commissioners decided they had no power, to get a bill passed giving them power to arbitrate. That was a scheme in my mind. Not long after that I was requested to send such papers as I had to Mr. Maynard, and I regarded that as terminating my connection with the case.

Q. Do you remember when Mr. Tucker was out here, a man that had a wooden leg?

A. I do not remember that I ever saw Tucker?

Q. Is that all?

A. That is as far as I remember now, in outline.

Cross-examined by Mr. WOOLWORTH:

Q. Did the defendant plead to the amended bill?

A. There was a demurrer to the amended bill, according to my minutes, and while the case was in that condition leave was given to file another amended bill, but that was never done, so that when the case was dismissed it was pending on the demurrer to the amended bill. The record will show.

Q. Did you ever participate in an argument on demurrer to either the original or amended bill?

A. No, sir.

Q. Do you know what questions were agitated on demurrer to either of these bills?

A. All I know about it is that I happened to be in court at some
71 time when the statute of limitations was discussed or referred to by Judge Dillon, and I remember that it was claimed that the claim on the notes and mortgage was barred by the statute of limitations. I remember Judge Dillon asked somebody if he thought there was any difference, if he thought the county had the same right to plead the statute as an individual would have, and that was agitated on the demurrer. I don't know on what ground the demurrer was decided.

Q. Was there a decision on the demurrer?

A. The demurrer to the original bill was sustained. The demurrer to the amended bill was never passed upon.

Q. Judge Dillon delivered the judgment of the court on the original bill?

A. I have no doubt he did, but I simply recollect being present when counsel were discussing the matter of the statute of limitations. Doane and Estabrook on one side and Poppleton on the other, or else he was not there. I don't know how it was. It came up one time and was discussed.

Q. It was dismissed for want of prosecution, was not it?

A. I don't know about that. It came up one time when Poppleton was out West on legal business and he got it reinstated.

Q. You say that early in the course of interviews with the board McCardle made some objection to the bargain as a hard one?

A. No, that was Poppleton said that.

Q. Was anything of that sort said in the interviews you had?

A. I think it was suggested by some member of the board, perhaps by Mr. McCardle, that the county paid a pretty large price for the property. I said in our proposition we are offering to take proof as to what was the fair value.

Q. I understood that your proposition was to have an inquiry made as to the value of the property at the time Chapman sold it to the county?

72 A. Yes, sir.

Q. And it was understood that the price agreed to be paid by the county was an excessive one?

A. No, I cannot say that.

Q. Then explain how it was that you offered to depart from the contract price and institute an inquiry as to the value of the property?

A. I thought, and Mr. Ely thought, that it would be fair if there was any claim that the county had paid more than it ought to. This would obviate any objection of that kind, and as we were appealing to the equity and fairness of the commissioners they could not object to that.

Q. You had heard that there was some objection to that?

A. I think I had heard in some vague way that it was claimed of late that the county had agreed to pay a pretty good price for the property.

Q. Don't you understand that it was a notorious fact through the community that the price that Chapman got or was to get was a very extortionate one?

A. No, I can't say that.

Q. Don't you know that at the time it was generally discussed here?

A. No, I can't say I did.

Q. Don't you know that when you was negotiating for a settlement, it was said that the price was extortionate?

A. No; I heard that Chapman had sold this to the county for a poor farm, but whether it was in talk with the commissioners or outside statements, I don't know now—I did understand that some persons claimed or suggested that the county had paid too much for the property.

Q. Do you know how much the county offered to pay to take up these warrants?

73 A. I don't know anything about it. I don't know who got them or when they were paid. I only know from the record.

Q. You only proposed to allow the county one thousand?

A. Yes, sir.

Q. Do you think it would be fair for the county to get a credit of one thousand when they paid five thousand to take them up?

A. They were worth less than fifty cents on the dollar.

Q. Supposing the county paid about five thousand to redeem the warrants, do you think it would be fair?

(Objected to as immaterial. It is a hypothetical question with no evidence in the case to base it on.)

A. I don't know. Mr. Chapman realized a thousand dollars, and if they chose to pay him in their warrants I don't think that either he or persons who bought this paper ought to allow more than a thousand. It may not have been an advantageous thing for the county to do; but if Mr. Chapman sold the warrants, as I understand he did, I don't think he could have got more than that for them in the market.

E. WAKELEY.

Signed in my presence.

HOMER STULL, *Examiner*.

A. J. POPPLETON, a witness called for complainants, being by me first duly cautioned and sworn, testified as follows, viz:

Mr. MAYNARD. You are an attorney at law, residing at Omaha?

A. Yes, sir.

Q. How long have you resided here?

A. About 24 years.

Q. Continuously?

A. Yes, sir.

Q. Are you acquainted with the subject-matter of this suit by Heman Ely and others against the board of county commissioners?

74 A. To a certain extent, I am.

Q. You know the general nature of the suit?

A. Yes, sir.

Q. State whether you ever had charge of the claim which is set up in this bill against the county.

A. I did.

Q. When did you first become acquainted with it?

A. Some time in 1867, according to my recollection—in the latter part of July or forepart of August, 1867.

Q. Do you recollect the fact that I was here the day the United States court was organized?

A. My recollection is that I first saw you in the court-room on the old capital building on the hill, but it don't go beyond that. It must have been about the first session of that court.

Q. Was not that in May?

A. I don't recollect now. I know that on the 27th of July, 1867, I had not these notes and mortgage in my possession, but I had at one time been before the commissioners and interviewed them as to payments.

Q. Did you not have copies of them before that?

A. That I am unable to state.

Q. Who called upon you and employed you in the matter?

A. I was employed by Mr. M. H. Maynard, one of the counsel in this case.

Q. State what you did?

A. The first thing I did I had some conversation with the commissioners preliminary to their meeting, and at the first meeting after the matter came into my charge, which was previous to the 27th of July, 1867, I went before the commissioners and made a formal statement of the situation to them and requested payment or adjustment in some form of the claim. At that time they made no question of the validity of the
75 claim, made no objection to it in any particular, save that Mr. McCardle thought, if I recollect right (he was one of the commissioners at the time), that it was a pretty hard bargain, had turned out so to the county, and seemed to be rather in a grumbling spirit, but interposed no legal objection and no claim to any legal defense to it, but on the contrary I was given the impression very decidedly in some manner or other.

(Counsel for respondents object to statement of the impression of the witness.)

The WITNESS. The statements of the county commissioners were to the effect that the claim in some form would be adjusted. It is so long ago that I cannot give the language.

Q. This was the first interview?

A. Yes; that was the first interview with the board. I think I had a talk with the commissioners before that individually.

Q. You may state any subsequent interviews?

A. I cannot state any specific interview I had with the commissioners except that I saw them several times and was always met in about the same way, and nothing was ever done about it.

Q. What did you do by way of enforcing collections?

A. Some time about the 14th of July, 1868, I brought a suit in the State court, I think on the 15th of June, 1868, in the district court of Douglas County.

Q. You may state the result of that action.

A. That suit was dismissed in July, 1868, upon the suggestion of Mr. Maynard, he objecting to the State court, and thinking that the federal court was the much safer tribunal.

Q. What occurred next?

A. I then brought a suit in the United States court. That bill, I believe, was filed March 15, 1869, and was a foreclosure of the mortgage upon the premises for which the notes were given.

76 Q. Did you previously put the notes in suit on the law side of the United States court?

A. I have no recollection of it; I may have done so; the records will show.

Q. This foreclosure was filed in March, 1869?

A. Yes, sir.

Q. What became of that case?

A. That drifted along until I became identified with the Union Pacific road to that extent that it became entitled to the whole of my time, and from about that time I was solicitous of having the matter passed into other hands, and I do not think I ever gave the case much personal attention after that. It drifted along until some time in 1871, when I found that my connection with the case substantially ceased. I think there was an amended bill filed in 1871. My impression is that I filed that, and I guess that is about the last action of mine in the case.

Q. Who succeeded you in having charge of the matter?

A. The case went from my hands into the hands of Judge Wakeley, as I understood.

Q. Did you have the notes and mortgage?

A. I received the notes and mortgage between the 27th of July and the 16th of August, 1867; and my impression is, without being absolutely certain, that I retained them until they were handed over to Judge Wakeley.

Q. You handed them over to Judge Wakeley?

A. I think so.

Q. Do you remember being before the board, as a board, more than once with reference to this matter during the time you had charge of it?

A. I know that I was before the board more than once, but it would be impossible for me to state any particular occasion.

Q. State whether there was any change in their attitude in reference to the claim.

77 A. None from first to last until after suit was commenced, and counsel commenced to make defense against the claim.

Q. Who were the commissioners?

A. I have to speak from recollection—McCardle, Purchase, Harrison Johnson, I think, but won't be certain. The records will show. McCardle I remember distinctly; I was better acquainted with him, and on closer terms than with any others—I may be mistaken about Johnson, but I don't think I am with anybody else.

Q. Was not Hurford commissioner at that time?

A. I don't think he was at that time.

Cross-examined:

Q. Mr. Poppleton, what was the course of the litigation in the State court?

A. Do you mean the successive steps of it?

Q. Yes, what was done by defendants by way of defense?

A. My recollection is, they interposed a demurrer, though I don't know, but some kind of a motion going to the form of the bill.

Q. What questions were agitated on that demurrer?

A. I do not recollect.

Q. That demurrer was argued at the bar?

A. I don't recollect.

Q. Who was the judge of the district court?

A. Judge Lake, I think.

Q. What was done by the defendants in the United States court?

A. I could not tell now without looking up the papers.

A. J. POPPLETON.

Signed in my presence.

HOMER STULL, *Examiner.*

M. H. MAYNARD, a witness called on the part of complainants, being by me first duly cautioned and sworn, testified as follows, viz:

Q. Where do you reside, what is your profession, and what was it at the commencement of this Ely litigation?

78 A. I reside at Marquette, Michigan, where I have resided since 1855, and during all that time I have been an attorney at law.

Q. State whether this claim was intrusted to you for collection, and when it was put in your hands.

(Counsel for defendant objects to this testimony as immaterial and irrelevant, and all such further testimony as may be called out in the examination of Mr. Maynard for the same reason.)

A. Louise A. Ely, one of the plaintiffs in this suit, is my wife's sister. It was at her request that I undertook to look after this claim against Douglas County in the first place, in 1867. I visited Omaha, I think, in May, 1867, and left the matter in the hands of A. J. Poppleton.

Q. Did you furnish him the data upon which he commenced the suit?

A. I furnished him the data which were given to me by Mrs. Ely.

Q. How came it that the suit was commenced in the name of Mrs. Ely and infant heirs of Charles Arthur Ely as assignees of the claim?

A. Because I understood that the estate of Charles Arthur Ely, deceased, had been closed. I was informed by the judge of probate of that county that the estate was closed on the first of April, 1866, and by Mrs. Ely that this claim was assigned to the infant heir, William A. Ely.

(Counsel for defendant objects to any statement of any of the parties to the witness.)

Q. State if you afterwards ascertained that that information was incorrect.

A. I ascertained that after 1871.

Q. State whether I (Mr. Wakeley) corresponded with you to obtain information.

79 A. I then ascertained that the assignment was not executed, that the legal title was in the executor.

Q. Did you have correspondence with the county commissioners?

A. I saw one of the county commissioners when I was here in 1867.

Q. Do you know which one?

A. I think it must have been Mr. McCardle; he says he is the man; I talked with him to-day.

(Counsel for defendants objects further to all conversations between the witness and one of the commissioners as an individual, as immaterial and incompetent.)

The WITNESS. Mr. McCardle was introduced to me by Mr. Poppleton as one of the county commissioners; I told Mr. McCardle my business here, and he made the remark that the matter ought to have been settled long ago, but of course as single commissioner he had no power to do anything which would bind the board. I said I was going to leave it with Mr. Poppleton, and he said he was very glad, that they would have no trouble with Mr. Poppleton, that he was a man for whom he had respect, or words to that effect. It was an interview on the streets—that was the substance of what was said. That was the day the United States court was organized here by Judge Love.

Q. How soon after this matter was rejected by the board were you informed of the result, and what steps did you take?

A. This bill was filed September 10, 1877. I first heard of the final refusal of the board to do anything to settle that claim that summer or that

spring, along probably in June or thereabouts. I then immediately set to work to institute this present proceeding. I filed the papers.

Cross-examination waived.

M. H. MAYNARD.

Signed in my presence.
HOMER STULL, *Examiner*.

80 JOHN R. MANCHESTER, a witness called for complainants, being by me duly cautioned and sworn, testified as follows, viz:

Q. You are at present the county clerk of Douglas County?

A. Yes, sir.

Q. How long have you been?

A. Since a year ago last January.

Q. State whether recently, at my request, and also at request of Mr. Maynard, you have examined the clerk's office to find a certain proposition from Heman Ely to Douglas County, and a written opinion of Mr. J. C. Cowin on the subject of that proposition.

A. I have searched for them.

Q. State how much and how carefully you have searched.

A. I have searched all the papers I have found about the clerk's desk, all the miscellaneous papers of any kind; I have gone through all the papers of that kind and separated them and pigeon-holed them, and I have gone through all the papers in my desk, and everywhere it would be apt to be, and I have not been able to find it at all.

Q. Are you satisfied you cannot find them?

A. I am very well satisfied I cannot find them; I have made a very thorough search.

Q. You have seen the records, have you, relating to Mr. Cowin's opinion?

A. Yes, sir; I have a certified copy here.

Q. Have you seen that opinion?

A. I don't remember that I ever saw it; I was in the office at the time; I was deputy when this proposition was put in there.

Q. Do you remember the fact of my (Judge Wakeley) submitting to the board a proposition?

A. I am not very clear on that, for it was very seldom that I attended to the board, but I have a general recollection of something of the kind.

81 Q. Do you remember the fact as to Mr. Cowin's sending in a written opinion?

A. I could not swear as to that.

Q. Have you here some extracts from the board of county commissioners which you have prepared certified copies of at a request of Mr. Maynard and myself?

A. I have.

JOHN R. MANCHESTER.

Signed in my presence.
HOMER STULL, *Examiner*.

Plaintiff offers in evidence transcript from the records of the board of

county commissioners March 6, 1859, (Ex. A) of March 4, 1859 (Ex. B), of March 5, 1859 (Ex. C), of July 3, 1876 (Ex. D), also certified copy of deed from Chapman to the county (Ex. E), also certified copy of the mortgage from the county to Chapman (Ex. F). Counsel for respondent objects to the certified copy of the pretended mortgage on the ground that the same was never executed by this defendant or by Douglas County. The papers above named are hereto attached, marked Exhibits A, B, C, D, E, and F, respectively.

EXHIBIT A.

DOUGLAS COUNTY, N. T., BOARD ROOM,
Omaha City, N. T., March 1st, 1859.

Pursuant to call of the acting county clerk of this county the commissioners of said county met this day at this office, at 10 o'clock a. m., for the disposal of county matters pertaining to their jurisdiction.

Present, full board of commissioners and Charles P. Birkett, acting county clerk, when the business of the session was disposed of as follows, viz:

H. Z. Chapman proposed to sell 170 acres of land, ten of which are timber, 2 miles from this city, for $5,000.00, one thousand (1,000.00)
82 dollars to be paid down, leaving $4,000.00 to be paid in four payments, as follows:

First year, ($1,100) eleven hundred dollars.
Second year, ($1,200) twelve " "
Third year, ($1,300) thirteen " "
Fourth year, ($1,400) fourteen " "

bearing interest at the rate of ten (10) per cent. annum until paid, which being included (interest) will make the total ($6,000) six thousand dollars, possession to be given on the 1st day of April next ensuing. Consideration deferred until to-morrow session.

THE STATE OF NEBRASKA,
Douglas County, ss:

I, John R. Manchester, county clerk and clerk of the board of commissioners within and for said county, do hereby certify that I have compared the foregoing extract from the records of said board with the original remaining in my office; that the same is a correct transcript therefrom, and of the whole of said record relating to the subject-matter of said extract.

In testimony whereof I hereunto set my hand and official seal this 27th day of March, A. D. 1879.

[SEAL.] JOHN R. MANCHESTER,
County Clerk.

EXHIBIT B.

DOUGLAS COUNTY, N. T., BOARD ROOM,
Omaha City, N. T., March 4th, 1859.

Pursuant to adjournment from yesterday to this day, the board of county commissioners for said county of Douglas met in this office at ten (10) o'clock a. m., for the transaction of business pertaining to their jurisdiction.

Present, Commissioners McCardle, Dodge, and Johnson, and Charles P. Birkett, acting county clerk, when the matters before the board were disposed of as follows, viz:

83 The commissioners, after some considerable effort to make a cheaper purchase and obtain better terms with Henry Z. Chapman, resolved to close the bargain with Chapman on the following conditions, for the land (170 acres) for poor farm of this county:

That in consequence of the depreciation of county orders at this present time, the first payment shall be at (50) fifty cents on the dollar, making the one thousand ($1,000.00) dollars to be $2,000.00, and as before for the remainder, being $6,000.00 to be paid according to the following agreement, viz:

(Copy.)

Agreement between Douglas County, N. T., and Henry Z. Chapman, for poor farm. (Sale of.)

Memoranda of an agreement, made and entered into this fourth day of March, A. D. 1859, by and between Henry Z. Chapman, of Douglas County, Nebraska Territory, of the first part, and the County of Douglas, in the Territory aforesaid, of the second part, witnesseth, that the party of the first part hereby agrees to sell to the party of the second part all that tract of land or ground now in the possession of said Henry Z. Chapman and known as, according to the United States survey, the northeast one-fourth (¼) of section twenty-nine (29), township fifteen (15), range thirteen (13) east of the sixth principal meridian in Nebraska Territory aforesaid (and also ten (10) acres of good timber land conveyed to said Chapman with said property), and to give a good, true, and veritable title to the said real estate, and all further and other assurances for the proper conveyance of the fee simple thereof and thereto to the party of the second part, on the following conditions, to wit:

[Omitted:] But signed opposite these to H. Z. Chapman, J. H. McC., H. Johnson, S. Dodge.

That the party of the first part shall pay to the party of the second part, at the ensealing and delivery of a warrantee conveyance from

84 the party of the first part to the party of the second part of the real estate aforesaid, two thousand dollars ($2,000.00) in county orders of the County of Douglas aforesaid on the treasurer of said County of Douglas, and the balance of six thousand ($6,000.00) dollars in four equal annual payments, together with interest on the amount due, at ten (10) per cent. per annum until paid; and the said party of the first part will, when required, resign to and give up the possession of said property to the party of the second part or its assigns or agents immediately on the payment of the first payment hereinbefore enumerated, and put the said County of Douglas or its agents in full and peaceable possession of said described property. And the said party of the second part agrees to purchase said property on the terms aforesaid of and from the party of the first part, and for the security of the deferred payments, as hereinbefore set forth, to give a mortgage upon said described property to the party of the first part.

In witness whereof the party of the first part has hereunto set his hand,

and the party of the second part, by James H. McCardle, Sylvanus Dodge, and Harrison Johnson, the county commissioners of the said County of Douglas, its hand and the seal of said county the day and date first above written.

(Signed) HENRY Z. CHAPMAN.
[COUNTY SEAL.] JAMES H. McCARDLE,
SYLVANUS DODGE,
HARRISON JOHNSON,
Co. Com'rs Doug. Co.

Signed, sealed, & delivered in the presence of—
CHAS. P. BIRKETT.

TERRITORY OF NEBRASKA,
County of Douglas, ss:

On this fourth day of March, A. D. 1859, personally appeared
85 before me, the undersigned, acting clerk of the court of the county commissioners of Douglas County, N. T., Henry Z. Chapman, and James H. McCardle, Sylvanus Dodge, and Harrison Johnson, county commissioners of Douglas County aforesaid, the signers and sealers of the foregoing instrument in writing, personally known to me as such persons and as such signers and sealers, and acknowledged that they executed and sealed the said instrument in writing as their own free and voluntary act, for the uses and purposes therein mentioned.

As witness my hand and the seal of the said County of Douglas, A. D. 1859.

[COUNTY SEAL.] CHAS. P. BIRKETT,
Act. Co. Cl'k Doug. Co., N. T.

1859, March 4. Filed and recorded by me.
CHAS. P. BIRKETT,
Act. Co. Cl'k, &c., &c.

It was also further agreed that as there was a mortgage on said Chapman's aforementioned land, that until said mortgage should be discharged (amount $150) that the note of first annual payment should be deposited in the hands of George B. Lake, attorney at law, as the friend of both parties, to be given up to Chapman only on the certificate of the county register of deeds that said mortgage is cancelled.

The necessary documents were placed in the hands of said Lake for the preparation of legal papers necessary to the completion of the purchase, which was arranged for to-morrow (March 5th, 1859).

THE STATE OF NEBRASKA,
Douglas County, ss:

86 I, John R. Manchester, county clerk and clerk of the board of commissioners within and for said county, do hereby certify that I have compared the foregoing extract from the records of said board with the original remaining in my office; that the same is a correct transcript therefrom and of the whole of said record relating to the subject-matter of said extract.

In testimony whereof I hereunto set my hand and official seal this 27th day of March, A. D. 1859.

[SEAL.] JOHN R. MANCHESTER,
County Clerk.

EXHIBIT C.

COUNTY OF DOUGLAS, N. T., BOARD-ROOM,
Omaha City, N. T., March 5th, 1859.

Pursuant to adjournment from yesterday to this day, the board of county commissioners of the county of Douglas met this day at ten o'clock a. m., at this office, for the transaction of matters pertaining to the jurisdiction of this board. Present, full board of commissioners, and Charles P. Birkett, acting county clerk; when the business of the session was disposed of as follows, viz:

A warrantee deed to aforementioned property (poor farm, Douglas County, N. T.) having been prepared, and all the conditions fulfilled, as per agreement recorded page 262–'3 of these minutes, and after additional resolution thereon (page 264), the purchase of said property was thus far completed, and the first instalment of $2,000.00 paid to Henry Z. Chapman by orders No. 819 to 822, in total $2,000.00, in full of all demands or such first instalment.

The warrantee deed of county poor farm this day given to county of Douglas by H. Z. Chapman was this day placed by the commissioners in the office of register of deeds of the county of Douglas aforesaid for registration in said office, and then returned to the office of the county clerk in this city.

87 THE STATE OF NEBRASKA,
Douglas County, ss:

I, John R. Manchester, county clerk and clerk of the board of commissioners within and for said county, do hereby certify that I have compared the foregoing extract from the records of said board with the original remaining in my office; that the same is a correct transcript therefrom, and of the whole of said record relating to the subject-matter of said extract.

In testimony whereof I hereunto set my hand and official seal this 27th day of March, A. D. 1879.

[SEAL.] JOHN R. MANCHESTER,
County Clerk.

EXHIBIT D.

OMAHA, *Monday, July 3rd*, 1876.

Board met pursuant to adjournment and in accordance with section 32 of the revenue law.

Present: Commissioners Redfield, McCardle, and Knight.

The following was adopted:

Resolved, That J. Cowin, esq., be requested to give his opinion in writing upon the following questions:

1st. Whether or not the county of Douglas is legally liable to pay for the property held and owned by the county and occupied as a poor farm.

2d. If not legally liable, whether or not the board of county commissioners has jurisdiction to allow for such property such sum as it may determine to be equitable, not exceeding the actual cash value when taken, with interest thereon, and deducting all payments, or has jurisdiction to allow any sum therefor.

THE STATE OF NEBRASKA,
Douglas County, ss:

I, John R. Manchester, county clerk and clerk of the board of
88 commissioners within and for said county, do hereby certify that I have compared the foregoing extract from the records of said board with the original remaining in my office; that the same is a correct transcript therefrom, and the whole of said record relating to the subject matter of said extract.

In testimony whereof I hereunto set my hand and official seal this 27th day of March, A. D. 1879.

[SEAL.] JOHN R. MANCHESTER,
County Clerk.

89 Thereupon, afterwards, to wit, on the 14th day of May, 1879 depositions taken on the part of the defendants was filed in said case, which said depositions are in words and figures following, to wit:

In the circuit court of the United States for the district of Nebraska.

HEWMAN ELY ET AL.
vs.
THE BOARD OF THE COUNTY COMMISSIONERS OF the County of Douglas. } In equity.

Testimony taken on the part of the defendant under the 67th rule of practice for the courts of equity of the United States, by Homer Stull, examiner in equity at Omaha, commencing on the 28th day of March, 1879.

Present, E. Wakeley, esq., and M. H. Maywood, esq., for complainants; J. M. Woolworth, esq., for respondents.

GEORGE B. LAKE, called for respondents, being by me duly cautioned and sworn, testified as follows, viz:

Q. How long have you lived in Omaha; and what has been your occupation during the period of your residence?

A. Twenty-one years last November; lawyer and judge.

Q. I believe you went on the bench in 1867?

A. Yes, sir.

Q. While practicing at the bar here were you acquainted with the value of real estate in Douglas County?

A. I was.

Q. Did you deal in the same for yourself and others during that time?

90 A. I dealt a little for myself in real estate, and was agent for a number of owners of real estate who resided in other States.

Q. Do you remember the transaction of the sale by Henry Z. Chapman of the poor farm to the county?

A. I do.

Q. Had you any connection with that transaction; and, if so, what?

A. I had some connection, but it is so long ago, and it so little impressed my mind at the time, I could hardly recollect what I did have to do with it now. I have nothing to refresh my recollection as to just what I did have to do with it.

Q. If the property was paid for by the county by warrants to the amount of two thousand dollars, the records of the county commissioners showing that the same were taken at 50 cents on the dollar, and notes and mortgage upon the premises for five thousand dollars more, state, in your opinion, what was a fair price for the 160 acres occupied for the poor farm.

(Objected to as immaterial.)

A. I have an opinion as to what it was worth at that time—a fair cash value. According to my recollection now of the way real estate was held at the time, some other real estate in other parts of the county as desirably located as—that, what it sold for—I am of the opinion that particular tract at that time was worth from ten to fifteen dollars an acre; that fifteen dollars an acre would have been a large price.

Cross-examined:

Q. It is not true that there were at that time but few actual sales of property in that vicinity?

A I don't know if there was any other sales in that immediate vicinity. I have reference more particularly to lands lying just north of the city.

Q. Within about the same distance?

A. Less; not more than half as far.

Q. Lands had been held considerably higher than they were in 1859.

91 A. Not while I resided here.

Q. You came in 1857?

Yes, sir.

Q. You don't know how it was before that?

A. I do not.

Q. Do you know whether there were improvements on this tract?

A. I believe there was a little; a very little, however. I have been over it several times. It had been improved somewhat and had grown up to weeds. We hunted pra'rie chickens over that.

Q. It was an eligible situation?

A. A good piece of land.

Q. A good location?

A. Yes, sir.

Q. Is it not true that the value of lands anywhere in the vicinity of Omaha or about that distance was to a great extent a matter of opinion rather than matter of actual determination from sales?

A. It may have been so at that time; still equally good land, as desirably located, could have been bought for fifteen dollars an acre.

Q. You don't know that any locations were offered the commissioners at that price?

A. I don't know that they made any effort to obtain any offers. One of the

commissioners came to my office with Mr. Chapman and told me the terms of the sales, and I had something to do with it. I think perhaps the papers were left in my custody.

Q. Do you remember whether after this the mortgage and notes were sent to the firm of Lake and Brown for the purpose of trying to get payments on them?

A. They were sent to a firm of which I was a member. Lake and Brown or Lake and Gilbert.

Q. What year?

A. I do not remember.

92 Q. It was previous to 1867, when you went on the bench?

A. Yes, sir; some time.

Q. Do you recollect whether you made efforts to get the commissioners to pay the claim?

A. Yes; application was made to the commissioners.

Q. Were any particular reasons stated why they would not pay?

A. I guess not, only inability to meet them. They had no means at that time.

Q. Do you remember any other reasons being offered?

A. No, sir.

Q. Do you remember from whom you received them?

A. I am now inclined to think I got them through the hands of M. R. Keith, of Cleveland.

Q. Do you remember who owned them?

A. Ely or Ely's estate, I am not certain which.

Q. Do you remember what disposition was made of the papers, what you did with the notes and mortgage?

A. I have no recollection now. I presume by going into Mr. Brown's office and searching our letter books I could ascertain. I have only a general recollection.

Redirect examination:

Q. What impression was made upon your mind by the statement to you by the county commissioners, or such one as came to you with Chapman, with respect to the terms of the sale?

(Objected to as irrelevant, incompetent, and immaterial.)

A. The impression made upon my mind was that Chapman had got an enormous price for his land. That was the impression of course. I knew it was much more than the land was worth.

Recross-examined:

Q. You knew Mr. Chapman pretty well?

A. I was pretty well acquainted with him.

Q. Is it not a fact that he had an uncommon talent to get a

93 good price for land; that he was a successful trading man?

A. That was the fact when he had weak men to deal with.

GEORGE B. LAKE.

Signed in my presence.

HOMER STULL, *Examiner.*

J. H. MCCARDLE, a witness called on the part of respondents, being by first duly cautioned and sworn, testified as follows, viz:

Q. Were you one of the county commissioners at the time they purchased the poor farm and ten acres of timber from Chapman?

A. Yes, sir.

Q. At that time, Mr. McCardle, how did timber land and pra'rie land compare in value?

A. There was great difference; there was no comparison; in fact pra'rie land in some places was very cheap, but timber land was generally worth a good price. I could hardly tell the difference between the value of that piece of timber and the pra'rie land. I would have to study and figure it up.

Q. Other pieces of land were offered to you for the poor farm at the same time, were they not?

A. Some pieces were offered to us, but it was in such a way as I could hardly call it an offer. Some land the commissioners could not recognize, because it was too far off; but there were pieces offered to us at lower prices than that was.

Q. What circumstance induced you to purchase that land?

A. It was near town and was a nice piece of land, but the principal inducement I had was ten acres of timber.

Q. What did you expect to do with the timber?

A. To fence the farm and keep the county house in fuel.

Q. What was the character of the timber land?

A. It was as good timber as there was near Omaha.

Q. You went to look at the timber?

94 A. Yes, sir; with a man that Mr. Chapman sent down.

Q. Can you give any estimate of the value of that timber at that time?

A. Well, I think the timber at that time would be worth probably one thousand dollars; that ten acres, one hundred dollars an acre.

Q. What was the practice of persons buying tracts of land in those early times with reference to pra'rie and timber?

A. There is scarcely a criterion, because timber was so scarce that it was not in market. At that time there was none in the county except Paddock's grove and Salem grove. These timber tracts were taken up so you could not get hold of it. You could not get an acre. Timber was so scarce you could not tell anything about it.

Q. Mr. Poppleton has testified that he went to the county commissioners to get them to pay this claim. Were you county commissioner at that time?

A. I was there when he was there to settle this matter.

Q. Did you have any conversation with him about the title to this ten acres of timber?

A. I don't believe it was mentioned.

Q. On what terms did Poppleton want to settle?

A. He wanted the principal and interest.

Q. Did you have any conversation with him in reference to the payment of the interest?

A. Yes, sir.

Q. State what it was.

A. I asked Mr. Poppleton if the notes had been presented, as they had come due, to the county, and he made a remark about Mr. Ely being insane,

and there was trouble there. I believe I made this remark: That I was willing, as one of the commissioners, to pay that thing if he would take payment as the notes came due and throw the interest off.

Q. What did he say?

A. He said he wanted it all; he guessed he could make the county pay the interest upon the whole thing.

95 Q. What, if anything, did the commissioners as a board offer? Did they make a proposition for a settlement?

A. I for one would have liked to settle it.

Q. I spoke of the board?

A. The board never was united for settlement. I did try to get them united for a settlement. I believed that this county had a right to pay something for that farm. I always advocated it. I think I made a proposition to Mr. Poppleton that was honest, but he did not concede to anything of the kind.

Q. What did the board do?

A. I remember that I told Poppleton that I wanted a thousand dollars thrown off for the loss of that ten acres of timber. I guess the notes call for one thousand apiece. I do not know exactly what the amount of the notes was.

Q. What do you say with reference to the action of the board as a board?

A. The final action was to submit it to Mr. Cowin.

Q. I ask what the county commissioners as a board ever did in the way of making a proposition for a settlement at any time?

A. We talked with Judge Wakeley and with Mr. Poppleton a great deal. Judge Wakeley was there twice or three times, and Mr. Poppleton once. I heard his testimony, and I think it is correct. Judge Wakeley said we should arbitrate it, each party to appoint a man and they to appoint a third. He was willing to settle it on that basis.

Q. What price per acre did Judge Wakeley name?

A. He said he was no judge—he named Harrison Johnson and several other names, and he was willing to leave it to them.

Q. Did he ever have a conversation with you about taking ten dollars an acre?

A. Not to my recollection. I said once I don't know, but I
96 said it was not worth more than ten dollars an acre. There was no land sold at the time, and you could not tell what the price of land was. There was trading for one thing and another, but no money transactions at all.

Q. You say, aside from the timber, that ten dollars an acre was the value?

A. I believe that at that time ten dollars an acre was all that it was worth. The timber made it valuable, in my view, for the use of the county. We could not get another piece with timber at that time; there was no coal and nothing for fuel; I was willing to give more for that piece on account of the timber; Mr. Chapman sold us 170 acres, and he was to defend the title. I remember the circumstances well.

Q. There was something said about the title to the ten acres?

A. There was some talk, but he hushed it every time and said he would secure the title.

Cross-examined:

Q. Did any of the commissioners go with you when you went to see the land?

A. I believe Mr. Johnson went down.

Q. At the same time?

A. Yes, sir; I think he did.

Q. When you say that you think that timber was worth one thousand dollars, was that your opinion at that time, or at present?

A. That was my opinion at that time.

Q. Did you ever know of timber land sold for one hundred dollars an acre at that time?

A. I have known one hundred being offered and could not get it; I don't know of any being sold.

Q. You know parties who held timber at that price?

A. I think Mr. Paddock was offered one hundred dollars an acre and he held it for more.

97 Q. Do you know that these notes were not presented when due?

A. I think not. They were not to my knowledge.

Q. Were you aware that correspondence was had between the clerk of your board and Mr. Ely with reference to these notes as far back as 1864, 1865, 1866, along there?

A. I do not remember. If there was a correspondence I did not know it. There might have been. I have no recollection.

Q. Were any letters ever laid before your board?

A. I believe there was. What time it was I cannot tell.

Q. Was it about the time the notes were due?

A. That I cannot tell.

Q. Don't you know letters were had at the time the last note became due?

A. I have no recollection of ever seeing one of the notes.

Q. That is not the question; whether letters were not written and laid before your board asking for interest to be paid?

A. If letters were written I have no recollection.

Q. Do you remember Mr. Poppleton?

A. I remember his coming before the commissioners.

Q. Suppose that was in 1867, would these letters have been received before or after that?

A. I could not tell.

Q. When you say you made a proposition to Mr. Poppleton that you wanted to pay the notes that was your private proposition?

A. There was a bar outside, and all people were kept outside from the commissioners, and I went outside and talked with him, Mr. Poppleton.

Q. During the session of the board?

A. Yes, sir; that was an individual matter.

Q. That was all the proposition you ever made?

A. Yes.

Q. You say you proposed to pay these notes as they came due,

98 the same as if they had just come due?

A. Yes, sir.

Q. You were willing to pay these notes about the time they came due without any interest?

A. Yes, sir; and taking out one thousand dollars for the timber land.

Q. That he rejected?

A. Yes, sir.

Q. You say you heard Judge Wakeley's testimony this morning?

A. Yes, sir.

Q. And it was correct with regard to the interviews had with the commissioners?

A. I think his testimony is correct.

Q. Is it not true that in 1859 there was scarcely any sales of property in the vicinity of Chapman's land, and value was pretty much a matter of individual opinion?

A. I think so myself.

Q. What improvements were there on this 160 where the poor-house now stands?

A. There was a shanty.

Q. Was there not a building?

A. It did not amount to much.

Q. Was not there a breaking?

A. A garden.

Q. Was not there a well?

A. There was a well dug out; no water in it.

Q. When you speak of ten dollars for that pra'rie land, you don't mean that land was buying and selling for any such price?

A. There was nothing to be governed by, and still I believe that ten dollars an acre was all it was worth.

Q. Still you gave six thousand for it, including the timber?

A. Timber was my object; land was held higher, but I had my own individual views.

99 Q. You don't think you could have bought as eligible land at ten dollars?

A. You could have bought nice land a little further out.

Q. Not as near Omaha?

A. No, sir; I guess not.

Q. You had offers?

A. We had offers at eight dollars further out.

Q. Is it not true that lands in the vicinity of this Chapman land had been held at high prices—men had held for it whether they got it or not?

A. That is true, and at the same time I was governed by common sense.

Q. You assented to this contract giving six thousand dollars as the best you could get?

A. Yes, sir.

Q. Was it not your opinion that the average value of timber and pra'rie could come up to what you gave?

A. That is a question. We were blamed and we were given credit. Some said we paid too much and others said we got it reasonable. That was to be determined by the commissioners. I did not care for a few dollars so as I got that piece of timber.

Q. Take the whole thing together, this being near the city, it was your conconscientious opinion it was the best thing the county could do?

A. If I had not thought so I would not have consented to it, although I was censured for doing it.

Q. Some said you paid too much and others said you did not?

A. Yes, sir.

Q. Down to this time, 1859, can you say that you knew of any sales of as good timber land as that as high as one hundred dollars?

A. I know of a piece of land that the owner was offered one hundred and fifty for, and he would not take it. I don't believe
100 the timber was as good. I saw no sales. Men asked such and such a price, but there were no sales so far as I remember.

Q. There was really no market?

A. I think timber at that time was quite an item; there was no coal and no signs of any. How could we have 20 or 30 people up there without some fuel?

Q. But as to market value it was a matter of individual opinion?

A. I could have taken that timber and sold it for one thousand dollars for fence posts. You could not buy a post here less than a dollar.

Q. Could you sell that land for a thousand dollars?

A. I don't know. I would not have sold it. I could not testify as to the price of it. I could not tell, but at the same time I put a good deal of confidence in that piece of timber. It was the means of my buying that land.

Q. In all these negotiations for settling this claim with Mr. Poppleton did the commissioners ever claim they have ever paid anything except one thousand?

(Objected to as incompetent, immaterial, and irrelevant.)

Q. The county never refused to pay this claim? They never refused to settle?

A. I could not tell; I was not commissioner always; I can only tell what passed between you (Judge Wakeley) and I and Mr. Poppleton. Three years I was not commissioner.

Q. How far from the State court-house is this poor farm?

A. About two miles, I guess.

Q. What has the county put on it since?

A. The county fenced it all in all around the 160, except 32 feet of road that is upon one side of it, and run a fence through the centre or near the center, a fence around the grave yard, a barn with windmill for
101 drawing water for stock and for the house; counting the buildings and all there are thirty thousand dollars' worth of improvements.

Q. The county took possession of the land immediately after the purchase, did it not?

A. I don't know as it was done until the next spring.

Q. When did you put inmates in the house?

A. That same spring we put an addition to the little house, a one-story-high building, and put in all the paupers we had right after that.

Q. Right after the purchase?

A. Yes, sir; some few months after.

Q. How much of the time have you been commissioner after the purchase?

A. The year of the purchase was 1859. I was commissioner to 1860; then I was out three years, and elected again as commissioner in 1872.

Q. You have been elected altogether five or six times?

A. Yes.

Q. Since 1859?

A. Three or four times.

Q. Do you remember when suit was brought against the county to recover the timber land in ejectment?

A. I don't know that there was any brought. We found out to our satisfaction that the title was valueless.

(Objected to as incompetent.)

Redirect examination:

Q. You were taking out posts from the timber tract, and were stopped?

A. Yes, sir.

Q. Do you know who stopped you?

102 A. I could not tell; I know the man we sent there, superintendent of the poor farm, with bob-sled. We sent him down there; he was stopped, and the sled was there for years.

Q. Do you remember how you were stopped?

A. I remember the superintendent came next morning and told us a man had told him to haul no more timber. We told him not to go there again until we found out whether we had title. Time went on until we found we had no title. There was no occasion to test the title that I know of.

Q. Did you say that you knew of cases where one hundred and fifty dollars an acre was offered for timber land and refused?

A. Yes, sir.

Q. And about the time you were making this purchase?

A. I could not say; it was within a year of the time. It was twenty years ago. I could not say it was at that time. I remembered it being offered.

(Objected to as immaterial and incompetent.)

Q. Is it not true that land was held a great deal higher and sold for a great deal more in 1856 down to the middle of 1858 than it did from 1858 down to 1860 and 1861? During that period, from the summer or fall of 1858 into the sixties, land was a drug?

A. I have known land that was claimed only, not entered, that was worth more than it is to-day; a man could get more for it.

Q. In the period from the summer of 1858 down to the 60's it had no market value?

A. There was no sale for it scarcely.

Q. Was not land offered as near town as that at ten an acre and could not find a purchaser?

A. No; I think not for ten dollars an acre. That is what keeps the county from being settled. Mr. Poppleton got fifteen dollars an acre for land on the Pappio, but that was after the purchase of the poor farm. I heard that.

Q. That was after the railroad was begun?

103 A. I guess so.

Q. And at that time property had begun to appreciate?

A. Yes, sir.

Q. Do you know anything about the sale by Weatherwax of part of his tract to Redick?

A. I remember the circumstances, and I ought to, because my father-in-

law was partner in the land, and Weatherwax got it all; $1,900.00 was paid for 80 acres. This is where Bartlett now has his house.

Q. Do you know the Marsten tract?

A. Yes.

Q. Did not Redick buy that?

A. I believe so; I do not remember.

Recross-examined:

Q. This tract was out in the neighborhood of the poor farm?

A. It was at least half a mile this side.

Q. Whenever it was that timber land was held and one hundred fifty dollars an acre for it; did you know personally about that, or hear of it?

A. I know one piece that a man offered one hundred fifty for.

Q. A single acre?

A. Three to five acres. Mr. Murry sold a tract for seventy-five an acre, as I heard, out on the Elkhorn, and there was some school land sold for fifty dollars out on the Platte River.

Q. Did not it come down very much?

A. Yes, sir; after the railroad came here and brought coal here. A cord of wood has been sold for twenty dollars in this town.

Q. On the whole, the price of timber land was to a great extent merely speculative and nominal; there were no sales?

A. Very few sales.

Q. If men had it they kept it?

A. Yes, sir.

JAS. H. McARDLE.

Signed in my presence.

HOMER STULL, *Examiner*.

104 JOHN R. MANCHESTER, a witness called for respondent, being by me duly cautioned and sworn, testified as follows, viz:

Q. State whether or not there is any record in your office of the issue of warrants to Chapman purporting to be in payment of the cash installment on this property.

A. There is a record of that.

Q. State whether or not there is any record in your office of what was done by the county in the way of taking of these warrants.

A. There is.

Q. Will you produce to the examiner the books of the county showing the issue of these warrants and a record of what was done with them, and, if other obligations were issued by the county in lieu thereof, what was done with the*ir* also?

(Complainant objects to so much of the records as show what was done about the payment or taking up of the warrants as immaterial and irrelevant.)

A. I will.

Q. Look upon that paper now shown to you and state where it came from *and state where it came from.*

A. It is a paper that was found in my office.

Q. Was it one of the files in your office?

A. Yes, sir; it was found among the papers on file in my office.

Q. Do you know the handwriting of any; and, if so, which of the parties whose names are signed to this paper?

A. I know the handwriting of J. H. McCardle; also Charles P. Birkett.

Q. Do you know Johnson's?

A. No, sir.

Q. State whether, in your opinion, the signatures of McCardle and Birkett are genuine.

105 A. I think they are.

Q. Look upon the indorsement on the back, and state with reference to the signature of Brickett there.

A. That is supposed to be the signature of Chapman; Brickett wrote it and Chapman signed it.

JOHN R. MANCHESTER.

Signed in my presence.

HOMER STULL, *Examiner*.

(Respondents offer this paper in evidence, and ask that the examiner make a copy, in order that the original may be retained in the files of the county clerk's office. Complainant objects, as irrelevant and immaterial. A certified copy of the paper referred to is hereto annexed, marked Exhibit G.)

JAMES G. MEGEATH, a witness called for respondent, being by me duly sworn, testified as follows, viz:

Q. How long have you lived in Omaha?

A. Between 20 and 25 years.

Q. What has been your business since you have been here?

A. Merchandising part of the time, and part of the time I have had no business.

Q. What acquaintance did you have with the value of real estate in the county from the time you came here down to 1863?

A. I was more or less buying and selling all the time.

Q. Were you acquainted with the tract of land Chapman sold the county for a poor farm?

A. Yes, sir.

Q. What, in your opinion, was the value of that 160 acres in March, 1859?

(Objected to as immaterial and irrelevant.)

106 A. I should think not over 12 or 15 dollars an acre.

Cross-examined:

Q. What is your criterion for fixing the value?

A. I have a much better piece of land adjoining that I bought in 1854; I own part of it yet, and I offered to sell my 340 acres for five thousand along some time after 1857, and from that to 1860.

Q. When did you offer it?

A. I can't remember.

Q. Can you come within two years of the time when you offered it?

A. I don't know; the bottom dropped out in 1857; I bought my land in 1857; it costs me between eight and nine thousand dollars for 360

acres, and I offered to sell it within two or three years after that; it was either in 1860 or 1861 I offered it to Mr. Whited for the balance of the mortgage that was on it, between four thousand five thousand dollars.

Q. You paid between eight and nine thousand dollars for three hundred and sixty acres, in 1857?

A. Yes, sir.

Q. Was it cash?

A. No, there was stock on it, farm implements, and so on; I paid for all. It was estimated that the stock and implements were worth one thousand.

Q. Then you paid eight thousand for the land?

A. Yes, sir.

Q. Unimproved?

A. No, sir; there was a house and some breaking.

Q. How big a house?

A. The same as on the other.

Q. It is true that property depreciated in 1857?

A. Yes, sir.

Q. Was it not less than it was in 1859?

A. It depended upon circumstances, whether a man was used up.

107 Q. Is it not true that there was not much actual sales in equal distance from Omaha in 1859?

A. I think there were very few sales.

Q. Real estate transactions were generally offers to sell cheap when men were obliged to sell?

A. So far as my case was concerned, I wanted to cancel the debt; I did not want to owe four thousand dollars; I would rather lose what I had paid on it.

Q. You did not want the property; you had got over wanting it?

A. I did not want it with a debt on it.

Q. Do you remember any cash sales about the poor house farm in or about the year 1859?

A. I could not fix the dates.

Q. The value was more a matter of individual opinion than the result of actual sales, was it not?

A. I presume likely that is true to a certain extent. I don't think there was many sales, because no one had money to buy land.

Q. It was hard times in the Territory and very few real-estate transactions?

A. Yes, sir.

Q. This poor house farm was an eligible location?

A. Yes, sir.

Q. It was generally conceded that it was a good location and a good piece of land?

A. Yes, sir.

Q. Did you offer your land to the commissioners?

A. I did not know they wanted to buy; I never heard of it until after the sale by Chapman.

Redirect examination:

Q. Was there any timber on your land?

A. Yes, sir.
Q. How much timber was there on it?
A. There must have been between seventy-five and one hundred acres of timber; there were springs and running water.
108 Q. The timber was healthy and heavy timber for this country?
A. Yes, sir.

JAS. G. MEGEATH.

Signed in my presence.
HOMER STULL, *Examiner.*

A. J. HANSCOM, a witness called for respondent, being by me duly cautioned and sworn, testified as follows, viz:

Q. How long have you lived in Omaha? and what has been your occupation since you have lived here?
A. Since the fall of 1854, with the exception of about seven years.
Q. State during what time you were gone.
A. From 1865 to 1872.
Q. State what your occupation has been from the first.
A. I have had so many occupations it would be pretty hard to tell. I have been dealing in real estate; the grocery business; doing a general trading business.
Q. And politics?
A. Yes.
Q. What was the extent of your acquaintance with the value of lands in Douglas County, and particularly within a circuit of two or three miles of Omaha, from the time you came here to 1860?
A. I was very well acquainted with the price of lands, because I was dealing in lands a great deal, and was well posted in the price of lands to the distance of four or five miles. I also sold a great many lots.
Q. Were you acquainted with the tract of land sold by Henry Z. Chapman to the county for a poor farm?
Yes, sir.
Q. Did you own a tract of land near by?
A. Yes, sir.
Q. What, in your opinion, was that tract of 160 acres worth at the time of that sale in the spring, in March, 1859?
109 (Objected to as immaterial.)
A. I should think it could not have been sold for more than two thousand dollars cash sale. I don't know as it could have been sold for that. Property was very low here before recovery had been had after the panic of 1857, and there was virtually no sale for property of that character at that time.

Cross-examined:

Q. You own lands adjoining?
A. Not adjoining, but near it.
Q. You offered lands to the county?
A. No, sir.
Q. You knew of this sale at the time?
A. Yes, sir; after it was made.
Q. Did you express your opinion at that time?

A. Yes, sir.
Q. There was an expression of public opinion divided for and against it?
A. I did not hear any one for it except the commissioners.
Q. There was no price for real estate?
A. It was very hard. If we sold it must be very low.
Q. Each man's individual opinion was about all the price there was?
A. What property would bring was the price. There was some sales, but everything was very low.
Q. Had property like this been held higher in years previous?
A. Yes, sir; a great deal higher before the fall of 1857.
Q. Higher than four thousand?
A. I don't know whether it would ever have sold for that.

Redirect examination:

Q. Were not lands offered at the low figures you spoke of without finding a purchaser?

(Objected to as leading.)

110 A. Yes, sir; I think there were. Any amount of lands could have been bought at as low figures as the value I put upon this—lands equally as valuable at that time.

Q. When did property begin to recover?

A. It began to get a little better in 1861, a very little, and when the railroad commenced building here then property commenced to recover; in 1863 I think that was. It was a year or two after that before it recovered much, but there began to be better prices.

A. J. HANSCOM.

Signed in my presence.
HOMER STULL, *Examiner*.

BYRON REED, a witness called for respondent, being by me first duly sworn, testified as follows, viz:

Q. How long have you lived in Omaha, and what has been your business since you have been here?

A. I have been here upwards of 20 years—24 years this fall. My business has been real estate agent.

Q. Are you acquainted with the value of real estate in Douglas County during the period of your residence here?

A. Yes, sir.

Q. What has the extent of your business as real estate agent?

A. I have done a large business, probably as large as any one, during the whole time of my business here.

Q. Are you acquainted with the 160 acres sold by Chapman to the county for a poor farm, and occupied for that purpose since?

A. I am.

Q. What, in your opinion, was that 160 acres worth at the time of the sale, March, 1859?

(Objected to as immaterial.)

A. I think it was worth twelve and a half or fifteen dollars an acre.

111 Cross-examined:

Q. There were not many sales of property in that vicinity at that time?

A. Not many; but there were some.

Q. Lands previous to 1859 had been higher than they were then?

A. Yes, sir; higher in 1857 than they were in 1859.

Q. There were some improvements on this land, were there not?

A. No improvements of value at that time. If there were improvements, it was of very little value. There was a building; but I don't think it was worth fifty dollars.

Q. Did not the commissioners use that to keep the poor in?

A. I believe they did. It fell to pieces. The commissioners built an addition to it.

Q. There was some breaking?

A. Yes, sir.

Q. There was a well?

A. Probably there was.

Q. A dry and eligible piece of ground?

A. Yes, sir; a very pretty piece of ground.

Q. A good location for a poor-house?

A. Yes, sir.

Q. It was pretty hard times in the Territory at that time, was it not, and real estate transactions were comparatively few?

A. Yes, sir; in 1859 or '60.

BYRON REED.

Signed in my presence.

HOMER STULL, *Examiner*.

E. B. CHANDLER, a witness called for defendant, being by me duly sworn, testified as follows, viz:

Q. How long have you lived in Omaha?

A. I came here in February, 1858.

Q. How long were you clerk in the district court of the Territory for the first district?

112 A. About five years.

Q. And then how long were you clerk of the United States circuit court?

A. A little more than a year.

Q. You were the first clerk?

A. Yes, sir.

Mr. MAYNARD. Do you remember the date of the organization of that court?

A. It was in the month of May.

Mr. WOOLWORTH. Were you acquainted with the value of real estate in Douglas County, from the time you came here to 1862?

A. I was.

Q. Had you dealings in real estate at that period on your own behalf, and on behalf of other parties?

A. I had several transactions of that kind.

Q. Are you acquainted with the land occupied by the county as a poor farm?

A. I am.

Q. What, in your opinion, was that land, being 160 acres, worth in March, 1859?

(Objected to as immaterial.)

A. Land was very low here. I think there was no market price for real estate, but judging from the price which I paid for a tract very near there I should think it was worth not to exceed ten dollars.

Cross-examined:

Q. When did you buy that tract?

A. I think I bought it in the same year.

Q. Did you know of any other sales?

A. Do you mean in the same vicinity?

Q. Yes, sir; in the same vicinity in the spring, or in March, 1859?

113 A. I think shortly after that Reed & Campbell bought a piece nearer than that. It was a piece of ground that was talked of for a cemetery.

Q. Confine your testimony to the spring of 1859?

A. I do not bring any to mind exactly.

Q. Is it not true that real estate transactions were very few?

A. Very few.

Q. And sales were generally where men were obliged to sell, and somebody could get it pretty cheap?

A. Perhaps, in a majority of instances, that was true.

Q. Do you compare this with a single transaction, and judge by that?

A. I paid less than half that for a piece nearer town. I know that generally land was very cheap.

Q. It had been higher?

A. When I first came here land was higher and prices were going down, and continued to for some time.

Q. Times were hard and money scarce?

A. Yes, sir; bottom had dropped out everywhere here.

Q. So that real estate sales were not peculiar?

Mr. WOOLWORTH. That is objected to. Circumstances that were uniform cannot be peculiar.

E. B. CHANDLER.

Signed in my presence.

HOMER STULL, *Examiner*.

GEORGE SMITH, a witness called for respondent, being by me duly sworn, testified as follows, viz:

Q. How long have you lived in Omaha?

A. Twenty-three years.

Q. What office do you hold?

A. At present I am county surveyor.

Q. How long have you held that office?

A. I guess ten years.

114 Q. State your knowledge of the value of real estate in Omaha, from the time you came here for the period of ten years thereafter.

(Objected to as immaterial and irrelevant.)

A. Property vascillated a great deal in price during those ten years. In 1856, 1857, property was at any price you might put to it. After the breaking of our wild-cat banks, in the winter of 1857, to 1863, property was very low; at the location of the Union Pacific property advanced; to 1867

there was a return of high prices, then a period of imaginary and very high prices, since which it has been on the decrease.

Q. What were your means of knowing the value of real estate during that period?

A. I handled but little during that period, except my own.

Q. State what that was.

A. It was the south part of the south part of section ten, immediately above town, here on this plateau, 160 acres. That I secured by squatter title, having settled previous to any government survey.

Q. Under the pre-emption laws?

A. I pre-empted one hundred and sixty acres. I had become somewhat embarrassed, and I sold fifteen acres of that in the spring of 1859. The best price I could get was fifteen dollars an acre. I was offered by a number of persons ten dollars an acre, and took quite a number to look at it.

Q. How long were you negotiating the sale?

A. About a month.

Q. What efforts did you make to effect that sale?

A. Every man that I thought had money I would attack for an investment.

Q. You made a great deal of effort?

A. It was my special business. I wanted to get out from under my embarrassments.

115 Q. State how that ground of yours lies with reference to the town.

A. It is a mile from Jefferson square—nearly a mile within the corporation limits on the north—the nearest I sold.

Q. What was the price of real estate hereabouts at that time?

A. I know of so few pieces changing hands I don't know that I can refer to a sale from memory. Every one nearly was changed in trade. I only know from my offer to sell my own. It was a desirable piece of land, and I could get no takers. I supposed land in general was tolerably low.

Q. State, from your knowledge, what the poor farm was worth.

A. It would be my judgment, in comparison with my own premises that I was offering for sale, it being further away—my inference would be it was of less value. My judgment is that it was no better land, and that it would not be higher at least than my own property.

Q. Look upon that paper marked "Ex., G. H. S., examiner," and state whether the road therein described was through the poor farm.

(Objected to as immaterial, irrelevant, and incompetent.)

A. It did run directly through the poor farm east and west 160 ro's.

Cross-examined:

Q. It is a fact, is it not, that in the spring of 1859, and about that time, real estate sales in the vicinity of Omaha were few?

A. As far as my knowledge extends, they were.

Q. Times were hard, and there was not much doing in real estate?

A. That was about the condition.

Q. Were not the sales mainly of men who were hard pressed financially and obliged to sell for what they could get?

A. I don't know of the condition of men financially. There were more offers than takers, evidently.

116 Q. The county was embarrassed in its finances, was it not, at that time?

A. I cannot state their status from memory.

Q. Were they not obliged to buy on credit?

A. I cannot say what their financial condition was.

GEO. SMITH.

Signed in my presence.

HOMER STULL, *Examiner.*

RICHARD KIMBALL, a witness called for respondent, being duly sworn, testified as follows, viz:

Q. When did you come to Omaha to live?

A. In 1855.

Q. When did you go from Omaha?

A. In 1859.

Q. What part of 1859?

A. I think it was in June, 1859, I went to Denver.

Q. What business, and when did you return?

A. I was in the livery business; and returned from Denver in 1860.

Q. When you lived here first until you went to Denver, state whether or not you had acquaintance with the value of real estate in Douglas County.

A. I used to buy it and sell it—town lots and claims.

Q. Were you acquainted with the value of real estate in the spring of 1859, in Douglas County?

A. I believe I was.

Q. What, in your opinion, was the value of the present poor farm of the county at that time?

A. Wild lands here at that time were worth in the neighborhood of ten dollars. I was selling claims over on the Pappio, right beyond

117 that place, for a nominal price; property was pretty low down, that is, land uncultivated.

Q. Do you know how much of that land was cultivated at that time?

A. No, sir.

Cross-examined:

Q. Land sales were few, were they not?

A. Very few.

Q. When sold, was it not considered that it had to be sold at a sacrafice to get money?

A. I don't think there was much money changed hands; there was more trades than sales for money.

Q. Was it not difficult to sell for money at even moderate prices?

A. Yes, sir.

Q. Those that sold were mostly men that were hard up?

A. Mostly emigrants for Denver.

Q. And they sold for what they could get?

A. Yes, sir.

Q. Was not the value of land pretty much an individual opinion rather than a fact derived from sales?

A. It was this way, a man that was able to hold would hold it.
Q. If able to hold they would not sell at ruling prices?
A. Yes, sir.
Q. Was not the county embarrassed in finances?
A. I really do not recollect that.

RICHARD KIMBALL.

Signed in my presence.
HOMER STULL, *Examiner.*

EXHIBIT H.—HOMER STULL, *Examiner.*

(Copy.)

OMAHA CITY, N. T., *M'ch* 1, 1859.

County of Douglas, N. T., to Henry Z. Chapman, dr.

118 For damage on farm for three hundred and twenty rods of extra fencing on road running from Omaha City, N. T., to Iron Bluffs, N. T. Amount of damage, $400.00.

HENRY Z. CHAPMAN.

Allowed March 1st, 1859, by us, county commissioners of Douglas County, Nebraska Territory.

HARRISON JOHNSON,
SYLVANUS DODGE,
JAMES H. McCARDLE,
Co. Douglas Comm'rs, N. T.

Attest:
CHARLES P. BIRKETT,
Act. Clerk Co. Douglas, N. T.

A true copy.

HOMER STULL,
Examiner.

(See other side for endorsement.)

CO. DOUGLAS OFFICE, N. T., *M'ch* 1, 1859.

Received of Douglas County, N. T., co. orders number 792 to No. 795, for $100.00 each, $400.00, in full satisfaction for all claims for damages by the location of county road from Omaha City aforesaid to the southern line of the said county of Douglas, N. T.

HENRY Z. CHAPMAN.

119 *County Warrant Register, Douglas County, Nebraska.*

Date of warrants.	No. of warrants.	Drawee.	Amount of warrant.	Payee.	Date of acceptance. Month.	Day.	Year.
* * *	*	* * *	* *	* * *	* *	* *	* *
1859							
March 5.	819	H. Z. Chapman	500	S. W. Baldwin	M'ch	5	'59
	820	" "	500	Kountz Bros	M'ch	5	'59
	821	" "	500				
	822	" "	500	S. W. Baldwin	M'ch	5	'59
* * *	*	* * *	* *	* * *	* *	* *	* *

Date of redemption. Month.	Day.	Year.	Endorsements or payments on warrants.	Principal.	Interest.	Total.
* *	* *	* *	* * * * *	* *	* *	* *
May	5	'69	Bonded May 5th, 1869	500		
June		'65		500	307.78	807.78
May	5	'69	Bonded May 5th, 1869	500		
			" " " "	500		
* *	* *	* *	* * * * *	* *	* *	* *

120 *Bonds issued under act of June 19th, 1867, calling in outstanding warrants of Douglas County, Nebraska.*

Number of bond.	Value of bond.		No. of coupon.	Value of coupons, payable Jan. 1, 1871.
*	* *	* * * * * * * * * *	* *	* * *
62	500	Paid Baldwin, Langdon & Nelson	4	17 50
63	500	Paid " " "	4	17 50
64	500	Paid " " "	4	17 50
65	500	Paid " " "	4	17 50
66	500	Paid " " "	4	17 50
67	500	Paid $525.00 & interest " "	4	18 37
*	* *	* * * * * * * * * *	* *	* * *

121 *Bonds issued by County of Douglas.*

Date.	No.	To whom issued.	Amount of first coupon.	Amount of bond.
1869				
May 5	62	Mess. Baldwin, Langdon & Nelson	5 44	500
" 5	63	" " " "		500
" 5	64	" " " "		500
" 5	65	" " " "		500
" 5	66	" " " "		500
" 5	67	" " " "		500

Date of warrant.	No.	Was issued to whom.	Amount.	Interest.	Total.
1859.					
March 5	819	Henry Z. Chapman	500 00	500 00	1,000 00
" 5	820	" "	500 00	500 00	1,000 00
" 5	822	" "	500 00	500 00	1,000 00
" "	823	" "	500 00	500 00	
" "	824	" "	500 00	500 00	[*3,024 99]
" "	825	" "	500 00	500 00	

* In pencil.

Received of C. A. Downey, co. clerk, the above bonds No. 62, 63, 64, 65, 66, & 67, dated May 5th, 1869.

BALDWIN, LANGDON & NELSON,
By GEO. B. LAKE, *Agent.*

OMAHA, *May* 17, 1869.

122 UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, Homer Stull, examiner in equity, duly appointed by the circuit court of the United States for the district of Nebraska, do hereby certify that on the day named in the depositions hereunto annexed I was attended at Omaha by the counsel and witnesses aforesaid; that the witnesses were each duly sworn and examined, and each deposition was reduced to writing by me and read to the witness (or read by the witness) and by him subscribed in my presence; that Exhibit H, K, L, and M were introduced in evidence in said cause during the taking of said depositions, and are hereto annexed.

HOMER STULL,
Examiner.

123 Thereupon, afterwards, at the May term of said court, on the 3rd day of June, 1879, the following proceedings were had in said case, as appears of record on folio 506 Journal E of said court:

HENRY Z. CHAPMAN, HEMAN ELY, EXECUTOR OF the last will, &c., of Charles A. Ely, deceased, Louise C. Ely, and William A. Ely
vs.
THE BOARD OF COUNTY COMMISSIONERS OF DOUGLAS County.

This cause came on to be heard upon the pleadings, proofs, and exhibits, and was argued by Messrs. Bonney and Wakeley for the plaintiffs and by Mr. Woolworth for the defendant, and thereupon it is ordered, adjudged, and decreed that the bill of complaint be, and the same is hereby, dismissed, and that the defendant have its costs to be taxed.

And thereupon, in open court, the complainants prayed an appeal to the Supreme Court of the United States from the said decree, which is allowed,

and the amount of the appeal bond to be given, if to operate as a supersedias, is fixed at $500, and if not to be a supersedias, at $250.

(Signed) SAM. F. MILLER, *Judge.*

Thereupon, afterwards, to wit, on the 27th day of September, 1879, an appeal bond was filed in said case, which said bond is in words and figures following, to wit:

Know all men by these presents that we, Heman Ely and Louise C. Ely, of Lorain County, State of Ohio, as principals, and John A. Foot, of said county, as surety, are held and firmly bound unto the Board of
124 County Commissioners of the County of Douglas in the full and just sum of five hundred dollars, to be paid to the said The Board of County Commissioners of the County of Douglas, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 13th day of September, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas lately, on the 3rd day of June, A. D. 1879, at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between Heman Ely, Louise C. Ely, William A. Ely, and Henry Z. Chapman, complainants, and the Board of County Commissioners of the County of Douglas, defendant, a decree was rendered against the said Heman Ely, Louise C. Ely, William A. Ely, and Henry Z. Chapman, dismissing the bill of complaint and for costs of said suit, and the said Heman Ely, Louise C. Ely, William A. Ely, and Henry Z. Chapman having in open court prayed an appeal therefrom to the Supreme Court of the United States, which was allowed, and being about to so appeal from said decree:

Now the condition of the above obligation is such that if the said Heman Ely, Louise C. Ely, William A. Ely, and Henry Z. Chapman, shall prosecute their said appeal to effect, and answer all damages and costs if they shall fail to make their plea good, and shall pay the amount so decreed to be paid, including just damages for delay, and costs and interest on appeal, and do whatever may be ordered, adjudged, or decreed by said Supreme Court, then this obligation to be void, otherwise to remain in full force.

HEMAN ELY. [SEAL.]
LOUISE C. ELY. [SEAL.]
JOHN A. FOOT. [SEAL.]

125 I consent to above as good bond.

J. M. WOOLWORTH,
Of Counsel for Def't.

27th Sept., 1879. Within bond approved.

ELMER S. DUNDY,
Judge.

126 Thereupon afterwards, to wit, on the 25th day of October, 1879, a stipulation was filed in said case, which said stipulation is in words and figures following, to wit:

In the circuit court of the United States for the district of Nebraska.

HEMAN ELY, LOUISE C. ELY, WILLIAM A. ELY, and Henry Z. Chapman, complainants,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE County of Douglas, in the State of Nebraska, defendants.

It is hereby agreed and stipulated as follows:

1. That on the 5th day of March, A. D. 1859, the said Henry Z. Chapman made and delivered to the defendant a deed of conveyance of the premises described in the bill of complaint, with full covenants of warranty.

2. That thereupon the county commissioners of Douglas County executed the instrument purporting to be a mortgage, and the several instruments purporting to be notes, which are respectively mentioned in the bill of complaint.

3. That at the time of such conveyance to defendant said Chapman had valid title to all said real estate, except the piece or parcel of land secondly described in the bill of complaint, containing ten acres.

4th. That on the 17th day of November, 1857, one John D. Scott, then claiming title to said ten acres, conveyed the same to one J. S. Wheeler, who afterwards conveyed the same to one Kellogg, who reconveyed
127 the same to said Wheeler on the 29th day of April, 1858, who retained such title until the sale of said premises upon execution, as herein mentioned.

5. On the 1st day of April, 1858, Martin Brothers recovered a judgment against J. S. Wheeler and Elias Brock in the district court for Douglas County, Nebraska, for $182.20, and thereupon caused to be filed in the office of the register of deeds of Douglas County aforesaid a claim or lien in the words and figures following, to wit:

District court, Douglas County.

MARTIN & BROTHERS, PLAINTIFFS,
vs.
J. S. WHEELER AND ELIAS BROCK, DEFENDANTS.

Judgment recovered at the March term 1858, on the 1st day of April thereof, for damages, $181.30; costs, 7.90; judgment, 189.20.

The above judgment is a lien on the following described real estate: All that part of the east one-half of the southwest quarter of section three, township fourteen north, range thirteen east.

JAMES M. WOOLWORTH,
Plaintiffs' Att'y.

Attest:

J. W. PADDOCK, *Clerk,*
By E. B. CHANDLER, *Deputy.*

Filed for record June 25th, 1858, at 9½ o'clock a. m.

THOS. O'CONNER, *Rg.*

128 Upon which judgment the said ten acres were sold on execution by due proceedings therefor to Charles R. Martin and William G. Martin, and conveyed to them by sheriff's deed August 31st, 1859, but no service, actual or constructive, appears on said Brock in said suit.

6. Said Henry Z. Chapman, when he conveyed to Douglas County, held title to said ten acres under said John D. Scott, through a conveyance from said John D. Scott to James A. Taggart on May 15th, 1858, from said Taggart to Reuben Wood and Charles R. King, and from them to said Chapman.

7. On the 21st day of September, A. D. 1859, the said Charles G. Martin and William R. Martin commenced a suit in equity in the district court for Douglas County, for removing the alleged cloud upon their title to said ten acres, against Elias Brock, John D. Scott, and all the subsequent grantees under said Scott, including Douglas County, but not against any person or persons holding said mortgage, and service was made on all said defendants, either personally or by publication. And in said suit, on the 11th day of July, 1860, it was decreed, among other things, that said County of Douglas be perpetually enjoined from setting up or asserting any right, title, or interest in or to said lands, or any part thereof.

8. That said Charles A. Ely became and was adjudged to be insane as and at the time alleged in the bill of complaint, and so continued to be without interruption until about September 30th, 1864, when he died, leaving him surviving said Louise C. Ely, his widow, and said William A. Ely, his sole child; that he duly made and executed his last will and testament at the time alleged in the bill of complaint, with such codicil as therein alleged, and which were admitted to probate as and when therein alleged, and which were of the purport therein alleged; and said Louise C.

129 Ely was appointed and became guardian of said William A. Ely, as alleged, and that said Heman Ely was duly appointed and became sole executor of said will, and so remained, as therein alleged.

9. That on the 13th day of June, A. D. 1868, said William A. Ely, by his next friend and guardian, Louise C. Ely, commenced in the district court for Douglas County, in the State of Nebraska, an action against said County of Douglas for the foreclosure of said mortgage given to secure said notes, and the defendant was served with process, and appeared therein and demurred to the petition, alleging as grounds of demurrer the statutes of limitations and incompetency of the authorities of the county to make the notes and mortgage, which demurrer was, upon argument of counsel, sustained by the court; and on the 21st day of July, 1868, on motion of plaintiff's attorney, the action was dismissed without prejudice.

10. On the 8th day of August, 1868, William Arthur Ely, by his next friend, Louise C. Ely, filed his bill of complaint in the circuit court of the United States for the district of Nebraska against said county, alleging the same notes and mortgage as in the bill in this cause are alleged and other matters, and prayed that the said mortgage be foreclosed and the premises sold to pay the mortgage debt; that thereupon process of subpœna was issued and served on the defendant, and after divers proceedings, and on the 19th day of November, 1868, upon the motion of the plaintiff, the said bill was dismissed without prejudice.

11. That on the 15th day of March, 1869, a suit in equity was commenced in the circuit court of the United States for the district of Ne-

braska by William A. Ely, by his next friend, Louise C. Ely, against the County of Douglas aforesaid, for the foreclosure of said mortgage
130 given to secure said notes, in which suit the defendant was served and appeared and interposed a demurrer, alleging the statute of limitations and that the commissioners of the county acted in excess of their authority in making the notes and mortgage in the bill mentioned, which demurrer was upon argument thereof sustained. After divers proceedings, by leave of the court, the plaintiff, on the 8th day of May, 1871, filed his amended bill, to which the defendant again demurred, pending which an order in the words following was made:

WILLIAM ARTHUR ELY
vs.
DOUGLAS COUNTY, NEBRASKA.

The parties herein consenting thereto, it is ordered by the court that this cause may be submitted to the court on the pending demurrer of said defendant to the amended bill of said plaintiff.

The arguments of respective parties to be filed by or before February 1st, 1872, unless the plaintiff, on or before January 1st, 1872, shall notify, in writing, the defendant's attorney that his bill is dismissed.

It is further ordered that this case be, and the same is, continued.

And on the 30th December, 1872, the plaintiff entered his order in the order-book dismissing his bill, and no other proceedings were had; of which dismissal counsel for defendant were notified pursuant to said order.

And it is further stipulated that the above facts were proven by the evidence of the respective parties taken and used on the trial, of which no transcript appears in the record.

This statement of facts being substituted therefor to abridge the
131 record; and that the same, together with the depositions and exhibits of the respective parties, of which a transcript appears in the record, constituted the evidence upon which the cause was tried.

Dated Omaha, Oct. 17, 1879.

JAMES M. WOOLWORTH,
Of Counsel for Def't.
E. WAKELEY,
Solicitor and of Counsel for Complainant.

DISTRICT OF NEBRASKA, *ss:*

I, Samuel F. Miller, justice of the Supreme Court, before whom the cause above entitled was tried, do certify that the foregoing stipulation as to the evidence upon which it was tried and the statement of facts appearing in evidence are correct, and I approve the same.

SAM. F. MILLER.

132 UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, Watson B. Smith, clerk of the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that the foregoing folios from one to 131 contain true and faithful transcripts from the records and files of said court in the case of Henry Z. Chapman, Heman

Ely, executor of Charles A. Ely, deceased, Louise C. Ely, and William A. Ely vs. The Board of County Commissioners of Douglas County, in the State of Nebraska.

Witness my hand and the seal of said court, at Omaha, this 31st day of October, 1879.

[SEAL.] WATSON B. SMITH, *Clerk.*

133 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court, of the October term, A. D. 1879.

HEMAN ELY, LOUISE C. ELY, WILLIAM A. ELY, and Henry Z. Chapman, appellants, *vs.* THE BOARD OF COUNTY COMMISSIONERS OF THE County of Douglas, appellee.	Appeal in equity from the district of Nebraska.

Assignment of errors.

And now come the said appellants, by the undersigned, their solicitors and counsel, and say that in the proceedings, orders, and decrees in favor of the said appellees, which are contained in the foregoing transcript of the record of the cause, there is manifest error in the following, among other things, to wit:

First. The said circuit court erred in dismissing the bill of complaint upon the final hearing of this cause.

134 Second. The said circuit court also erred in not decreeing in favor of the appellants the relief sought and prayed for in said bill of complaint.

Third. The said proceedings, orders, and decrees are otherwise manifestly erroneous and contrary to the law of the land.

Wherefore the said appellants pray that for the errors aforesaid the final decree of the said circuit court dismissing said cause for want of equity may be annulled, reversed, and altogether made as nothing;

135 and that this cause may be remanded to the said circuit court, with directions to enter such orders and decrees therein in favor of said appellants as are prayed for in their said bill of complaint; and that they may be restored to all things which they have lost by reason of the errors aforesaid, &c.

C. C. BONNEY,
M. H. MAYNARD, &
E. WAKELEY,
Solicitors and Counsel for Appellants.

Joinder in error.

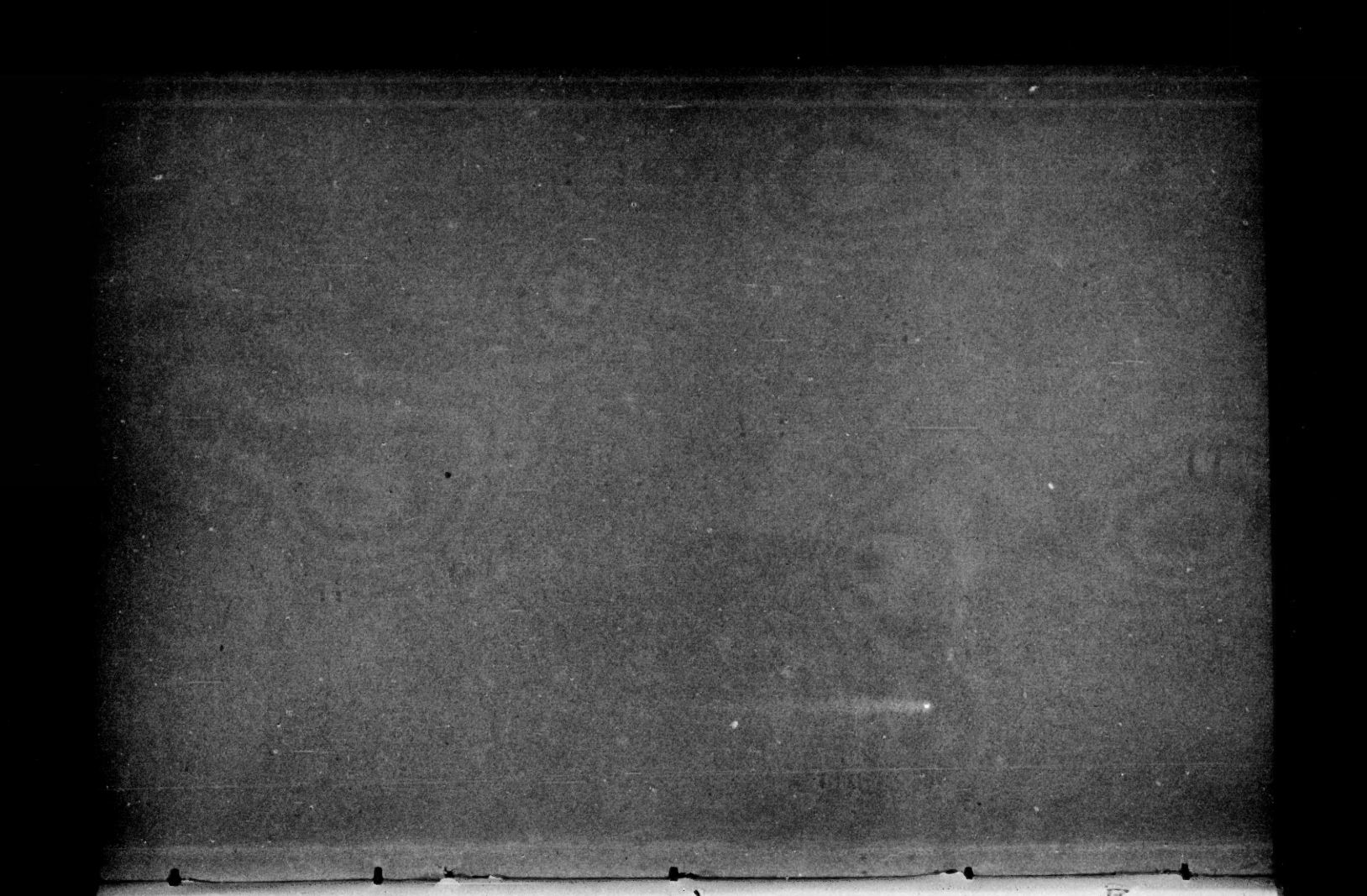
And hereupon come said appellees, by the undersigned, their solicitors and counsel, and say that there is no error in the proceedings, or-

136 ders, and decrees aforesaid; and they pray that the said Supreme Court may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid assigned for error, and that the judg-

ment and decree of the said circuit court dismissing the said bill of complaint may be in all things affirmed, &c.

J. M. WOOLWORTH,
Of Counsel for Def'ts & Appellees.

(Indorsement on cover:) No. 143. Henry Z. Chapman, Heman Ely, executor of Charles A. Ely, dec'd, Louise C. Ely, & William A. Ely, by Louise C. Ely, his guardian, appellants, vs. The Board of County Commissioners of Douglas County. Nebraska C. C. U. S. Filed 11th November, 1879.



17-348

Supreme Court of the United States.

October Term, 1882.—Filed December 18, 1882.

HENRY Z. CHAPMAN, HEMAN ELY, EXECUTOR OF C. A. ELY, DECEASED, ET AL., APPELLANTS,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF DOUGLASS COUNTY.

No. 143.

WILL OF C. A. ELY AND CODICIL.

THE STATE OF OHIO, Lorain County, } *ss.*

Will of Charles Arthur Ely.

Be it remembered that at a session of the Court of Probate within and for the county and State aforesaid, held at Elyria on the twelfth day of November, in the year of our Lord one thousand eight hundred and sixty-four, Hon. C. H. Doolittle, judge of said court, the following proceedings were had in relation to the last will and testament and codicil thereto of Charles Arthur Ely, late of Elyria, deceased, to wit: This day came Heman Ely and presented the last will and testament, and the codicil thereto, of Charles Arthur Ely, late of Elyria, deceased, and it appearing by the oaths of George Garford and Hannah Briggs, the subscribing witnesses to said will, and by the oath of John W. Bullock, one of the subscribers to said codicil, that the said testator, at the time of executing his said last will and testament, and the codicil thereto, was of full age and of sound mind and memory, and not under any restraint, and that they signed as witnesses to said will and codicil in the presence of said testator, and by his special request, and also in the presence of each other; and it further appearing by the oaths of Mozart Gal-

lup and John W. Bullock that J. W. Hough, the other subscribing witness to said codicil, has gone to parts unknown to them; that they were acquainted with said J. W. Hough and with his handwriting, and that the signature to said codicil is in the handwriting of said J. W. Hough: It is therefore ordered that said will, and the codicil thereto, be admitted to probate and record; which said will and codicil and the testimony in proof thereof are in the words and figures following, to wit:

Will of Charles Arthur Ely.

In the name of the Benevolent Father of all, I, Charles Arthur Ely, of the village of Elyria, county of Lorain and State of Ohio, do make and publish this my last will and testament. I give and devise to my executors hereinafter named all my property, both real and personal, upon the sole trusts nevertheless hereinafter expressed.

ITEM 1. To pay my funeral charges and all my just debts.

ITEM 2. In the event of my leaving me surviving any child or children, I do direct my said executors—

Section 1. To convey to the board of trustees hereinafter named and appointed in fee-simple the store building standing on lots Nos. 78 and 79, in block No. 77, in the village of Elyria aforesaid, together with the land on which the same stands, upon the trust and for the sole purpose of establishing and forever maintaining a public library and reading-room for the benefit of the citizens of said Elyria and vicinity, to be styled and known as "The Elyria Library"; and I do direct said board of trustees to use and appropriate the same for that purpose such portion of said building as may be required to be used as such library and reading-room, and the remainder rented to the best advantage and the rent proceeds of the same to be appropriated for the maintenance of said library and reading-room and for the purchase of books for the same.

Section 2. That my said executors shall sell for the best advantage any of my real estate of the value of five thousand dollars as appraised and inventoried by them, which land shall not at the time of my decease be productive of revenue, unless my executors deem it best to sell other lands, and pay the proceeds thereof to said board of trustees, which proceeds I direct said board of trustees to invest in books for such library.

Section 3. That said executors do sell real estate unproductive of revenue at the time of my decease, unless they deem it best to sell other lands, of the value of ten thousand dollars as appraised and inventoried by said executors, and safely invest the proceeds thereof in the name and for the benefit of said board of trustees; and I do direct that the income of such investment be forever applied by said board of trustees each alternate year to the purchase of books for such library, and of some works of art, either painting or sculpture, to be carefully selected by said board and placed in said library or library building.

Section 4. That said executors convey to said board of trustees, in fee-simple, lot number 122 in block number 63 in said village of Elyria, in trust for the purpose of erecting thereon, after the decease of my wife, a building for a library and reading-room as aforesaid; provided that if I should previously to my decease have sold said lot, that then said executors do convey as aforesaid to said board of trustees such other lot in said village of Elyria as in the judgment of said executors and board will be most suitable for the purpose of erecting thereon such building.

Section 5. That said executors do convey to Harwood M. Redington in fee-simple real estate belonging to me and suitable for farming purposes, out of the village of Elyria, of the value of five thousand dollars as inventoried and appraised by said executors.

Section 6. That my said executors do pay to my wife, Louise C. Ely, half-yearly, upon her receipt in writing, for and during the period of her natural life, the one-half of the income of the remainder of my estate after paying expenses; and do allow my said wife to reside in and have the exclusive control and use of the dwelling premises and appurtenances where I now reside, and also all such of my personal property as she may require and select for her comfort and convenience, including books from my private library to the amount of five hundred dollars. The balance of my said library I do direct to be added to the public library hereinbefore provided for.

Section 7. That the said executors do pay to the guardian of my child or children hereinafter named upon her receipt in writing, half-yearly, the other one-half of the income of said remainder of my estate during its or their life or lives, until the portion or portions of said child or children shall be conveyed to it or them as hereinafter directed.

Section 8. That when any such child shall arrive at the age of twenty-one years, said executors are directed to fairly appraise and inventory said remaining portion of my estate, and to fairly and justly apportion and divide and convey in fee to said child or children respectively, as they may reach such age as aforesaid, its or their equal portion or portions of said one-half of said remainder of said estate, according to the number of children.

Provided, however: And I hereby expressly authorize and empower my said executors, in case they shall think best for said child or children, after consultation with my said wife, on account of said child or children not having finished its or their education, or being for any other reason not prepared to assume the care of its or their affairs, to delay such appraisal, inventory and apportionment, and conveyance to such child or children for a reasonable period, not exceeding five years after said child or children respectively may have reached said age of twenty-one years; but they are to make such division and conveyance at any time after such child or children shall reach twenty-one years of age, when such child or children may be desirous and competent in the judgment of said executors, after consultation as aforesaid, to engage in business.

And in case of such conveyance, if there be more than one child,

the income of the portion of any such children not conveyed shall continue to be paid to said guardian as aforesaid, for said child or children, until such portion shall be conveyed to said child or children respectively.

Section 9. That after the decease of my said wife the said executors do transfer and convey to said board of trustees of the said "Elyria Library" the said one-half of my estate, of which the income was so paid to her; which property I do direct said board of trustees to prudently manage, change, and invest, so as to produce the largest revenue, and out of the same, first, to erect on said lot number 122, in said Elyria, or such other lot as may be conveyed for that purpose as provided in section four hereinbefore, a building suitable for such library and reading-room, not to exceed in cost the sum of twenty thousand dollars, to be forever used for that purpose, said money so to be invested to be raised out of the sale of lands not productive of revenue, if any there be belonging to my estate; second, that said board of trustees, out of the same, do invest the sum of ten thousand dollars in the purchase of books for said library, and that said board of trustees do forever appropriate the income or revenue of the property so invested to the maintenance and for the benefit of said library and reading-room according to their best discretion.

ITEM 3. It is my will in the event I leave no children me surviving that my said executors do dispose of my property as follows:

Section 1. That they convey to said board of trustees hereinafter named, in fee-simple, said lot number one hundred and twenty-two, in block number sixty-three, in said village of Elyria, in trust for the sole purpose of erecting and maintaining thereon a building for a library and reading-room as aforesaid; or in the event of my selling said lot previous to my decease, that then my said executors do convey to said board of trustees as aforesaid such lot belonging to me in said village as in the judgment of said executors and trustees will be most suitable for the purpose aforesaid.

Section 2. That said executors do sell and dispose of lands belonging to my estate not being at my decease productive of revenue of the value of $20,000, according to their inventory and appraisement, for the best advantage and pay the same to said board of trustees; and I do direct said board of trustees, within a reasonable time after my decease, to invest said proceeds, or so much as may be required, in the erection of a suitable building for said library and reading-room upon said lot No. 122, or upon such other lot as may be conveyed to them in lieu thereof, not to exceed in cost the sum of twenty thousand dollars.

Section 3. That my said executors do pay to my said wife, Louise C. Ely, half-yearly, upon her receipt in writing, for and during the term of her natural life, the one-half of the net income of the residue and remainder of my said estate, and do permit and allow my said wife to use and control exclusively during the same period the dwelling premises and appurtenances where I now reside; and also

all such portion of my personal property as she may require and select for her comfort and convenience, including five hundred volumes from my private library, the balance to be placed by executors in said public library under the control of said board of trustees.

Section 4. That said executors do convey in fee-simple to Harwood M. Redington real estate belonging to me out of said village of Elyria, and suitable for farming purposes, of the value of five thousand dollars, as inventoried and appraised by them.

Section 5. That my executors do sell and convey lands unproductive of revenue at my decease of the value of ten thousand dollars, as inventoried and appraised by them, and invest the proceeds thereof at a fair rate in their own names, and pay the net income thereof yearly to Dr. Alleyne Maynard for and during the term of his natural life.

Section 6. That said executors do pay to said board of trustees the sum of ten thousand dollars, which money I do direct said board of trustees to invest in the purchase of books for said library, to be called and known as before named, and to be forever maintained for the purpose aforesaid.

Section 7. That said executors do sell and convey lands for the best advantage, choosing such lands as shall not produce income at my decease, if most advisable, of the value of ten thousand dollars, as inventoried and appraised by them, and invest the net proceeds in the name of said board of trustees; and I do direct said board of trustees to forever apply the income of said investment alternately to the purchase of books for said library one year, and the other year to the purchase of works of art, either painting or sculpture, for said library building, to be by them carefully selected.

Section 8. That my said executors do transfer and convey the remainder of the one-half of my estate not required to raise said income for my said wife, to said board of trustees in fee-simple, the income whereof I do direct said board of trustees forever to appropriate to the maintenance of said library and reading-room, and the purchase of books for the same.

Section 9. That after the decease of my said wife and Dr. Alleyne Maynard, and either of them, I do direct that my executors transfer and convey in fee to said board of trustees the property out of which their respective annuities were raised and paid as aforesaid, upon the following trusts; and I do direct said board of trustees to prudently manage and invest the same so as to produce the greatest revenue, and to forever appropriate the income to the establishment and maintenance of a school of art in connection with said library, together to be called and known as "The Elyria Library and School of Art," and that they do pay such salary or annuity to such persons as may be eminently qualified to preside and instruct in said school as shall induce them to become connected with the same in such capacities; and said board of trustees are authorized to expend a sufficient amount of such income to build an addition to said library building if it should be necessary for said school. And it is my will

and desire that the attendance on said school be forever free to all who, upon examination by the instructors therein, shall exhibit those qualities that will insure excellence in that department of art to which they devote themselves, and that the control, government, and management of said school, the establishment of degrees, and the adoption of all necessary rules and regulations therefor, be intrusted to said board of trustees and said instructors.

ITEM 4. I do hereby nominate and appoint my wife, Louise C. Ely, the guardian of my children.

ITEM 5. I do hereby nominate and appoint Heman Ely, Harwood Redington, and George Olmstead executors of this my last will and testament, hereby authorizing and empowering them to compromise, release, and adjust as they may think proper all debts due me, and to execute and release acquittances and conveyances whatsoever necessary to carry out the provisions of this will.

ITEM 6. I do hereby nominate and appoint as the first board of trustees of said "Elyria Library" and "School of Art" my executors aforesaid, with Dr. Alleyne Maynard and John R. Finn, and do direct that in the event of the death, resignation, or incapacity of any of said board of trustees the vacancy or vacancies be filled by the remaining trustees, under the hands and seals of a majority of them, from persons proper and competent to execute said trust according to the true spirit thereof, so that at all times said board consist of the number of five trustees, and no more.

In testimony hereof I have hereunto set my hand and seal this 19th day of March, in the year one thousand eight hundred and fifty-six.

CHAS. ARTHUR ELY.

Signed and acknowledged by said Charles Arthur Ely as his last will and testament in our presence, and signed by us in his presence.

HANNAH BIGGS.
GEORGE GARFORD.

THE STATE OHIO, }
Lorain County, } *ss.*

In the Probate Court at Elyria, in and for said county, on the 11th day of November, A. D. 1864.

Testimony in proof of the last will and *testimony* of Charles A. Ely, deceased, late of Elyria, in said county.

George Garford and Hannah Biggs, the subscribing witnesses to the last will and testament of said Charles A. Ely, deceased, being duly sworn and examined in open court, on the day and year aforesaid, depose and say that the said testator, at the time of executing his said last will and testament, was of full age and of sound mind and memory, and not under any restraint, and that they signed as witnesses to said will in the presence of said testator and by his special request, and also in the presence of each other.

GEORGE GARFORD.
HANNAH BIGGS.

Which said testimony was reduced to writing, and signed by said witnesses in open court this 11th day of November, A. D. 1864.

Attest: C. H. DOOLITTLE, *Judge.*

"*Codicil.*"

Whereas I, Charles Arthur Ely, on the 19th day of March, in the year one thousand eight hundred and fifty-six, made my last will and testament of that date, I do hereby declare the following to be a codicil to the same:

ITEM 1. Since the execution of my said will, having sold my homestead, the use of which I therein devised to my wife, Louise C. Ely, I do direct, in case I may hereafter provide another homestead for our permanent residence, that my said executors, as soon after my decease as may be convenient, do convey in fee-simple such homestead, together with so much of the grounds or lands appurtenant and adjacent to the same as she may require and desire, to my said wife, Louise C. Ely.

Second. I do direct my executors, as soon after my decease as they conveniently can, to convey in fee-simple to my said wife, Louise C. Ely, in case she survives me, the remaining one-half of all my estate and property, after providing for the specific legacies of my said will; being the same remainder and property the income of which they were directed by said will to pay to her during her natural life; and for the purpose of ascertaining and making an equal and satisfactory division of such property so to be conveyed to her, in case of her so surviving, three competent and disinterested persons are to be chosen as follows: My said wife shall choose one, my said executor another, and the two so selected to choose — third, any two of whom may determine, direct, and inventory the specific property so to conveyed to my said wife.

Third. In case my said wife do not survive me, then I do direct that my said executors do convey the property so to have been conveyed to her to the said board of trustees upon the following trust: I do direct said board of trustees to prudently manage, sell, and invest the same and the proceeds of the same so as to produce the greatest revenue; and to forever appropriate the income of the same as follows: One-half to be appropriated to the establishment and maintenance of an agricultural school, in connection with the library hereinafter named, together to be called and known as the Elyria Agricultural School and Library, or so much of said proceeds as may be necessary for that purpose; and said executors are authorized to appropriate a sufficient quantity of land for agricultural purposes as may be required for the purpose of said school.

And the other half or the remainder of said proceeds, after establishing and providing for the maintenance of said agricultural school, shall be appropriated to the establishment of the library named in said will, according to the terms and directions therein specified in regard to the same; except that no such proceeds or revenue are

required to be invested in works of art, as in said will directed, further than this: that said executors do procure a statue of my late father, Heman Ely, deceased, with masonic emblems upon the same, and place the same upon the public square in said town of Elyria.

Fourth. The bequest to Dr. Alleyne Maynard in my said will is hereby wholly revoked.

Fifth. I do hereby nominate and appoint Norton S. Townshend, of Avon, and James Monroe, of Oberlin, members of said board of trustees in the place of Dr. Alleyne Maynard and John R. Finn, who are hereby superseded, with the same power and duties as *are* in my said will are conferred and imposed upon said board.

Sixth. I do desire that no sale of any personal property be made, and that the Probate Court direct the omission of the same in pursuance of the statute.

In testimony whereof I have hereunto set my hand and seal this first day of December, in the year one thousand eight hundred and fifty-seven.

CHAS. ARTHUR ELY.

Signed and acknowledged by the said Charles Arthur Ely as his last will and testament in our presence, and signed by us in his presence.

JOHN W. BULLOCK.
J. W. HOUGH.

THE STATE OF OHIO, }
Lorain County, } *ss.*

In the Probate Court at Elyria, in and for said county, on the 10th day of November, A. D. 1864.

Testimony in proof of the codicil to the last will and testament of Charles Arthur Ely, deceased, late of Elyria, in said county.

John W. Bullock, one of the subscribing witnesses to the codicil to the last will and testament of Charles A. Ely, deceased, being duly sworn and examined in open court on the day and year aforesaid, deposes and says that the said testator, at the time of executing his said codicil to his last will and testament, was of full age and of sound mind and memory, and not under any restraint, and that he signed as witness to said codicil in the presence of said testator, and by his special request, and also in the presence of the other witness, John W. Bullock, which said testimony was reduced to writing and signed by said witness in open court this 10th day of November, A. D. 1864.

Attest: C. H. DOOLITTLE, *Judge.*

THE STATE OF OHIO, }
Lorain County, } *ss.*

I, Mozart Gallop, of Elyria, in said county, being sworn, depose and say that I am acquainted with J. W. Hough, formerly a resi-

dent of said town of Elyria, and one of the witnesses to the codicil of the last will and testament of Charles A. Ely, deceased, late of said Elyria. I further say that said J. W. Hough left said town of Elyria four or five years ago, and has gone to parts unknown to this affiant; and said affiant further says he is well acquainted with the handwriting of said J. W. Hough, and knows his signature to said codicil is in the handwriting of said J. W. Hough.

MOZART GALLOP.

Sworn to and subscribed before me, and in my presence, this 10th day of November, A. D. 1864.

C. H. DOOLITTLE, *Judge.*

THE STATE OF OHIO, } *ss.*
Lorain County, }

I, J. W. Bullock, one of the subscribing witnesses to the codicil of the last will and testament of Charles A. Ely, depose and say that I was present and saw J. W. Hough, one of the subscribing witnesses to the codicil of the last will and testament of Charles A. Ely, sign his name to the same, and know that the same is in this own proper signature; and I further say that said J. W. Hough, then a resident of Elyria, has now gone to parts unknown to this affiant.

JOHN W. BULLOCK.

Sworn to and subscribed before me this 12th day of November, A. D. 1864.

C. H. DOOLITTLE, *Judge.*

THE STATE OF OHIO, } *ss.*
Lorain County, }

Probate Court.

I, E. H. Hinman, sole judge and ex-officio clerk of the Probate Court within and for said county and State, do hereby certify the foregoing to be a true copy of the last will and testament of Charles Arthur Ely, late of Elyria, in the county and State aforesaid, deceased, together with the testimony and order of our said court admitting said will to probate and record, as the same appears from the files and records of said court.

In witness whereof I hereunto set my hand and official seal of said Probate Court at Elyria, Ohio, this 14th day of December, A. D. 1882.

[SEAL.] E. H. HINMAN,
Probate Judge and ex-officio Clerk of the Probate Court.

THE STATE OF OHIO, } ss.
Lorain County, }

I, E. H. Hinman, sole judge of the Probate Court within and for said county, hereby certify that the signature attached to the above certificate purporting to be that of E. H. Hinman is his genuine signature, and that he was at the time thereof ex-officio clerk of said Probate Court, and as such full faith and credit are due his acts.

Witness my hand and the seal of said court at Elyria, Ohio, this 14th day of December, A. D. 1882.

[SEAL.] E. H. HINMAN,
Probate Judge.

(Endorsed:) Supreme Court U. S., 1882, October Term; No. 143; Henry Z. Chapman, Heman Ely, exc'r of C. A. Ely, dec'd, et al., appellants, *v.* The Board of County Commissioners of Douglass county. Will of C. A. Ely and codicil. Filed 18th Dec., 1882.

17-348

OFFICE SUPREME COURT U. S.
FILED
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1882

No. 143.

HENRY Z. CHAPMAN AND OTHERS,
vs.
DOUGLAS COUNTY, NEB.

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF NEBRASKA.

BRIEF FOR APPELLANTS.

C. C. BONNEY,
GEORGE WILLEY,
OF COUNSEL.

CLEVELAND, O:
J. B. SAVAGE, PRINTER, FRANKFORT ST.
1882.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1882.

No. 143.

HENRY Z. CHAPMAN,
HEMAN ELY,
As Executor of CHARLES A. ELY, deceased;
LOUISE C. ELY, AND
WILLIAM A. ELY,
By LOUISE C. ELY, his Guardian,
APPELLANTS,

VS.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF DOUGLAS, IN THE STATE OF NEBRASKA,
APPELLEE.

APPEAL FROM THE U. S. CIRCUIT COURT FOR THE DISTRICT OF NEBRASKA.

BRIEF FOR APPELLANTS.

MAY IT PLEASE THE COURT:

This is an appeal from a decree of the Circuit Court dismissing a bill in equity exhibited by appellants against the appellee.

STATEMENT OF THE CASE.

On March 4, 1859, Henry Z. Chapman entered into a written contract with Douglas County, Nebraska, for the sale by said Chapman to said county of 170 acres of land for a poor-farm.

(Printed Record, 37.) The price agreed upon was $5000; of which $1000 was to be paid down, and the remainder in four equal annual installments with interest added at the rate of ten per cent. per annum (P. R., 36). Pursuant to the contract, Chapman gave a deed of the land to the county, March 5, 1859, and received from the county warrants amounting to $2000, taken at fifty cents on the dollar (P. R., 37, 39), and also four notes with interest included, for $1100, $1200, $1300 and $1400, falling due in one, two, three and four years respectively (P. R., 8, 62), also a mortgage of the 170 acres, purporting to secure said notes (P. R., 8. 9). The county took and has ever since held possession, except as below stated, but the notes have never been paid.

About November 26, 1860, Chapman, for a full consideration paid in good faith, sold and transferred the notes and mortgage to Charles A. Ely, of Elyria, Ohio (P. R., 18). About September 1, 1861, Ely became insane (P. R., 4, 63). On April 14, 1862, he was placed under guardianship (P. R., 19). He continued insane till his death, September 30, 1864, and left surviving, Louise C. Ely, his widow, and William A. Ely, his sole child (P. R., 4, 63). By his last will, made before his insanity, and duly probated November 16, 1864, Charles A. Ely left all his property, real and personal, to his executors; Heman Ely alone qualified as such executor, in which capacity he still continues to act (P. R., 4, 19, 63).

In January, 1864, when all the notes had matured, Heman Ely, as guardian of his brother, requested payment of the notes. He was informed that no provision had been made for payment, but if a proposition making liberal concessions were made, it would be received and acted upon, and it might induce the people to vote the necessary tax, as had been done in similar cases (P. R., 21).

Two suits were begun in 1868 to foreclose the mortgage, and dismissed without prejudice (P. R., 63). Another bill was filed March 15, 1869, to foreclose the mortgage, and this also was dismissed without prejudice, December 30, 1872 (P. R., 64). The present bill was filed September 10, 1877 (P. R., 1). In 1871 the Supreme Court of Nebraska decided in another case, under similar circumstances, that the county authorities in Nebraska had no power to make such notes and mortgage (P. R., 4).

The bill in this case is brought by Heman Ely, as executor, Louise C. Ely, widow, and William A. Ely, heir and devisee of Charles A. Ely, deceased, and Henry Z. Chapman, who joins for the benefit of the representatives of Charles A. Ely, against the county authorities of Douglas County, for the surrender of the 170 acres, and an accounting of the rents and profits; or, in case the county shall elect to retain the land, to compel the county to pay for it (P. R., 12). The bill sets up the conveyance by Chapman to the County, and the giving of the notes and mortgage by the County, with the mutual belief that the county had power to make such notes and mortgage (P. R., 3). It alleges the assignment of the notes and mortgage by Chapman to Charles A. Ely, and his subsequent insanity and death, and the appointment of Heman Ely as executor (P. R., 3, 4). The bill also alleges the nonpayment of the notes, the occupancy of the land by the county, and that the rents and profits greatly exceed one thousand dollars, the amount paid on the purchase, and that the county has often admitted its obligation to pay, but has sought and obtained indulgence and delay on account of the unsettled condition of the county finances (P. R., 4). It claims that since similar notes and mortgages were held void by the Supreme Court of Nebraska, the county, not having paid the purchase price, holds the title to said lands as mere trustees of

Chapman for the benefit of the representatives of Charles A. Ely, and that the insanity and death of Ely, the non-age of his heir, the distance between the parties, the intricacy of the questions of law involved, and the efforts towards an amicable settlement, are an abundant excuse for any delay in filing this bill.

The bill seeks the enforcement of the vendor's lien, and sets up as grounds of relief, the mistake as to the power of the county to make the notes and mortgage; and the fraud of the county in keeping the land, and attempting to avoid payment therefor.

The theory of the bill is that the deed from Chapman to the county, and the mortgage from the county to Chapman are parts of one transaction, and both must stand or fall together (P. R., 6). The bill prays for the surrender of the land and an accounting for the rents and profits; or if the county elect to keep the land, that the county be compelled to pay for it, and for other relief.

The answer of the county admits the purchase of the land; the delivery of the deed by Chapman, and the delivery of the notes and mortgage by the county, and the occupancy of the land by the county; also that no part of the deferred payments has ever been made, and that the rents and profits exceed $1000 (P. R., 11, 12). Denies that Chapman has any right or title to the notes or to the land, either in his own behalf or in behalf of any other party or parties. Admits that similar notes have been held invalid, and that the county has resisted divers efforts of the representatives of Charles A. Ely to obtain payment thereof, and sets up laches of complainants in asserting their rights (P. R., 12). Alleges that the cash payment was the fair value of the land, and that the balance represented by the notes was so much in excess of the true value, and the notes were obtained by fraud

(P. R., 12, 13). Alleges that the title to ten acres of the land failed. Also that William A. Ely, by his guardian, Louise C. Ely, filed a bill to foreclose this mortgage in 1868, which was dismissed; and another bill in 1869, which also was dismissed, December 31, 1871. Insists that plaintiffs ought not to maintain their bill, because defendant did not undertake or promise within five years next before the filing of the bill; and because defendant did not undertake or promise, nor become seized of said lands or the title thereto, within ten years before the filing of the bill, but fourteen years had elapsed, during which time the evidences of the fraudulent and unjust contract of purchase have disappeared, and the commissioners who made said contract on behalf of said county, were long since gone out of office (P. R., 14).

To this answer a replication was filed (P. R., 15), and evidence taken in substance as above stated. After it was established in 1871, that the notes and mortgage were illegal and invalid, a proposition of settlement was presented to the county, and was debated, and action thereon delayed till 1876, when the county decided to repudiate the claim (P. R., 27, 29). The entire effort of defendant's testimony is to show that the county paid too large a price for the land (P. R., 40–60). If so, the sale was upon credit, and the credit was very poor (P. R., 24).

The charge of fraud in the purchase is not sustained, nor is there anything in the evidence tending to show bad faith on the part of the complainants or any of them. Two of the county commissioners who made the purchase from Chapman testified in this case, and the evidence demonstrates affirmatively that the county has not suffered any injury through the fault of the complainants, unless it be in the loss of the ten acres, for which compensation can be made in this case, according to the settled

practice (P. R., 21, 42). The question of title to the ten acres of timber land (P. R., 63), is not relevant to matters to be determined upon this appeal, but can properly be adjusted upon reference to a Master, as is shown in another part of this brief.

Since the perfecting of this appeal Louise C. Ely has died, and a stipulation has been filed in this cause setting forth the fact and that all her interests have been vested in her son, William A. Ely, who is made a party to the record for himself and as executor of his mother.

THE ERRORS COMMITTED BY THE COURT BELOW.

1. Upon the foregoing facts the Court erred in not requiring the county to surrender the land in controversy, or make due payments therefor.

2. Upon the foregoing facts the Court erred in holding the matters of defence, set up in the defendant's answer, sufficient to bar the relief sought by the bill of complaint, and in dismissing said bill upon the hearing thereof.

3. In particular the Court erred in holding that the complainants are barred by the Nebraska statutes of limitation, set up in said answer.

4. And assuming that there is a statute of limitations which is applicable to the case, which assumption is, however, denied, the Court below erred in not interposing to prevent the bar of such statute in this case.

The particular points included in these assignments of error are set forth below, with the authorities which sustain them.

POINTS AND AUTHORITIES FOR APPELLANTS.

Point 1.

The county had power to make the purchase of the poor-farm, and to collect and appropriate the money to pay for it. But it had not the power to make the notes and mortgage in question.

Stewart v. *Otoe Co.* 2 Neb., 183.

Hence, the purchase was within the corporate power, and for a lawful purpose; it was only the mode of securing the unpaid purchase money that was unlawful. There is nothing in the case which can constitute a reason why the county should retain the land, without making full payment.

Point 2.

The property of Chapman was actually taken by Douglas county, and has ever since been applied to the public use. But neither Chapman, nor his legal representatives, have yet been paid for the land. The retention of the land for the public use, without payment, is in violation of the Constitution of Nebraska. Article 1, section 13, forbids the taking of property for public use without just compensation therefor.

The wilful and persistent withholding of the land, after it was known that the supposed securities given for it were illegal and void, will be held *in equity* the equivalent of taking and application against the will of the owner, and payment or surrender should be decreed.

Point 3.

Complainants are entitled to the enforcement of a vendor's lien.

In equity, the purchaser of land not paid for, is held to be a

trustee of the purchase money for the vendor, and will be ordered to pay it over.

The taking of a separate and independent security, other than that of the land conveyed, will discharge the lien. The taking of a mortgage on a part of the premises will indicate an agreement to discharge the residue from the lien. But the taking of a mortgage upon the whole of the premises will not discharge the lien, but will rather be evidence of an intention to continue its existence.

The vendor of land has a lien on the land for the amount of the purchase money, not only against the vendee himself, and his heirs, and other privies in estate, but also against all subsequent purchasers having notice that the purchase money remains unpaid. To the extent of the lien, the vendee becomes a trustee for the vendor; and the vendee's heirs, and all other persons claiming under him or them, with notice, are construed by courts of equity to be trustees. * * * The principle upon which the lien depends is this: that a person who has obtained the estate of another, ought not, in conscience, to keep it, and not pay the consideration money in full; and a third person, who receives the estate with a full knowledge that it has not been paid for, ought not, as a matter of equity, to be allowed to keep it without paying for it. It will at once be seen that, as between the parties, this lien is founded in natural justice.

Perry on trusts, Secs. 231, 232, *et seq.*
Chilton v. *Braiden*, 2 Black., 458.
Brown v. *Gilman*, 4 Wheat., 291.
Gilman v. *Brown*, 1 Mason, 212.
Fish v. *Howland*, 1 Paige, 30.
Boos v. *Ewing*, 17 Ohio, 520.

McLearn v. *McLellan*, 10 Peters, 640.
Hopkins v. *Cockerell*, 2 Grattan, 88.
Moreton v. *Harrison*, 1 Bland,, Md. 491.
Lingan v. *Henderson*, Ibd., 236.
Driver v. *Hudspeth*, 16 Ala., 348.
Relfe v. *Relfe*, 34 Ala., 500.

The vendor's lien is wholly independent of possession on the part of the vendor. The principle is, that a person having gotten the estate of another, ought not, in conscience, to be allowed to keep it and not pay the consideration money. 2 Story's Equity, 462—7.

By the doctrine of the Federal Courts, which is also held in Alabama, Texas, Kentucky, Indiana and Iowa, the lien runs with the land, and may be enforced for the benefit of a third person as against the purchaser of the land. The assignment of the note given for the purchase money, carries with it to the assignee, the vendor's lien. Whatever questions may arise as to third persons claiming in virtue of a superior equity, there can be no equity in favor of a purchaser who has obtained land, and yet withholds the price.

Perry on Trusts, Sec. 238 and note 1.
McLearn v. *McLellan*, 10 Peters, 640;
And cases *supra*.

There are cases *contra*, such as:

Baum v. *Grigsby*, 21 Cal., 172, and
Edminster v. *Higgins*, 6 Neb. 265, but they are against the weight of authority and the general doctrines of equity. At least, the want of perfect harmony in the authorities leaves the Court free to make such a decision as equity and good conscience require.

POINT 4.

But while the notes and mortgage are void as securities for the purchase money, they, nevertheless, constitute a perfectly good memorandum within the statute of frauds; and fully express the terms of the trust upon which the county holds the land.

The notes and mortgage also constitute a sufficient instrument in writing to support the transfer of the rights of Chapman, the vendor, to Ely, who, for full value, purchased them from him.

The trust in the case is, therefore, an *express trust*, about the existence of which there can be no controversy. It is not an *implied* trust, raised by implication as an incident to the subject matter of an agreement. It is not a *resulting* trust, springing out of the relations of the parties, without any express contract. It is not a *constructive* trust, arising from an attempt of a party standing in a fiduciary relation, to acquire some undue personal advantage.

Perry on Trusts, Secs. 24—27.

Chapman conveyed the land to the county, to be held under the express terms of the notes and mortgage, for him, and as his property, until the residue of the purchase money should be paid. The notes and mortgage had no other purpose.

Express trusts need not be created and declared in writing, but only manifested or proved by writing.

An express trust need not be declared in express terms. It is sufficiently declared or created if shown by any proper written evidence, such as an answer to a bill in equity, note, letter, or memorandum disclosing facts which create a fiduciary relation.

If there is any competent written evidence that the person

holding the legal title is only a trustee, that will open the door for the admission of parol evidence to explain the position of the parties.

Perry on Trusts, Secs. 79, 81, 82, 863.

POINT 5.

To keep the land and withhold the purchase price, is a continuing fraud.

It is a maxim of common honesty as well as of law, that a party cannot have both the land and its purchase price. An election to keep the land is an election to pay the money. An election not to pay the money, is an election to surrender the land.

An admission by the vendee that he has the land, and that the purchase money has not been paid, entitles the complainant to relief.

Maple v. *Kussart*, 53 Penn. St., 348.
Pursley v. *Hays*, 17 Iowa, 310.
Deferd v. *Mercer*, 24 Iowa, 118, and other authorities cited in this Brief.

The purchaser cannot dispute the title of the vendor while he remains in possession. He cannot hold the land and say he has not got it. *Willison* v. *Watkins*, 7 Wheat., 53.

The charge of fraud in the purchase was never made before the filing of the answer to the present bill. That charge is not sustained by the defendant's evidence, and is manifestly incredible.

The wrong-doing in the case is all on the part of the county. It obtained the land from Chapman on his faith in pretended securities which have since been held illegal and void. The evidence shows an offer on Chapman's part to rescind the con-

tract and take back his land; and that this was not accpted by the county authorities. (Record 18.) On the contrary, the county authorities have steadfastly refused either to pay for the land or to surrender it.

POINT 6.

The notes and mortgage were made by the county, and received by the vendor, with the mutual belief that they constituted a valid and enforceable security for the balance of the purchase money. They were made and received under a mutual *mistake* of the power of the county, under the law. Until the Supreme Court of Nebraska held such notes and mortgage *ultra vires* and void, the complainants rested in the belief that they were secure in all their rights.

The mutual mistake of the parties, in regard to the power of the county, and the validity of the notes and mortgage, gives the Court jurisdiction to decree the relief sought. Cases of mistake, or of misapprehension of right, are entitled to the interposition of the Court.

Relief may be given in equity for a mistake of the law, as well as for a mistake of the fact. This doctrine is established by numerous authorities. There is no arbitrary rule, but each case must stand upon its own circumstances.

Mistake of law may be a misapprehension of the law, or of their private rights to property by both parties to a transaction, both of them making substantially the same mistake; or it may be a misapprehension of the law or his private right *by one of the parties alone.*

Where the legal principle is confessedly doubtful, and one about which ignorance may well be supposed to exist, a person acting under a misapprehension of the law will not forfeit any of his legal rights by reason of such mistake.

Kerr on Fraud and Mistake, 398, 399, *n.* 400 and authorities cited.

Story's Equity Juris., Sec. 138, et seq.

Hopkins v. *Mazyet*, 1 Hill, S. C., 172.

Lowndes v. *Chisholm*, 2 McCord, S. C. 455.

Evarts v. *Strode*, 11 Ohio, 486.

Harvey v. *Charles*, 45 Mo., 159.

Savings Bank v. *Insurance Co.*, 31 Conn., 529.

Fitzgerald v. *Peck*, 4 Littell, Ky., 127.

Jones v. *Munroe*, 32 Ga., 188.

Kerr on Fraud and Mistakes, 396, et seq.

Bispham's Principles of Equity, p. 240, et seq.

Pool v. *Docker*, 92 Ill., 509.

McKelway v. *Armour*, 2 Stock., N. J., 115.

Beardsley v. *Knight*, 4 Vt., 481, and 10 Vt., 190.

King v. *Doolittle*, 1 Head., Tenn., 85.

Harrell v. *DeHormandie*, 24 Tex., 125.

Irick v. *Fulton*, 3 Gratt., Va., 196.

Whelen's Appeal, 70 Penn. St., 425.

Cook v. *Sumner, &c., Co.*, 1 Smead, Tenn., 716.

Harney v. *Charles*, 45 Mo., 159.

Hunt v. *Rousmanier*, Admrs., 8 Wheat., U. S. 211 and 1 Peters 1.

Sampson v. *Mudge*, 13 Fed. Rep., 260.

Snell v. *Insurance Co.*, 98 U. S., 90.

Louisiana v. *Wood*, 102 U. S., 295.

Marsh v. *Fulton Co.*, 10 Wall., 676.

Kennard v. *George*, 44 N. H., 440.

Eaton v. *George*, 40 N. H., 258 and 42 N. H., 375.

Comed v. *Marcy*, 13 Gray, 377.

Brown v. *Glines*, 42 N. H., 160.

POINT 7.

The statutes of limitation do not apply, and the suit is not barred by laches. The relation between purchaser and vendor is that of trustee and beneficiary. The trust is fully expressed in writing, and no lapse of time is a bar.

The evidence shows continuous acknowledgments of the debt, and negotiations for settlement, down to 1876. It also completely overcomes the charge of laches; and excludes the idea of an abandonment of the claim, or of any undue neglect in pressing it upon the county authorities for payment; and the evidence demonstrates that the county has not suffered any injury from the delay.

In the present case, the complainants seek to recover *the land*, not the purchase money. The bill merely leaves the case open for the county to come in and beg from the Court the privilege of paying the purchase money and interest, if it shall elect to keep the land. No money-decree is asked, except for the surplus of rents and profits; but complainants seek a decree that the county surrender the land which is still held by it in trust for the vendor, under its repudiation of the contract of purchase. See *Amory* v. *Lawrence*, 3 Clifford, bottom of page 532, and top of page 533, where the distinction is shown between a claim for the land *in specie*, against parties directly chargeable, and a claim for money where other considerations arise.

The following authorities sustain and illustrate this point:

Perry on Trusts, Secs. 79, 81, 82, 863.
Kerr on Fraud and Mistake, 276.
Chilton v. *Braiden*, 2 Black., 460.
Hopkins v. *Cockerell*, 2 Grattan, 88.

Moreton v. *Harrison*, 1 Bland, 491.
Relfe v. *Relfe*, 34 Ala., 500.
Blake v. *Chambers*, 4 Neb., 90.
Nelson v. *Carrington*, 4 Munf., 332.
Reardon v. *Searcy*, 1 Litt., 53.
Tate v. *Greenlee*, 2 Hawks, N. C., 486.
Falls v. *Torrance*, Ibd., 490.
M. B. T. Bridge v. *Vreeland*, 3 Green, Ch. 157.
Craig v. *Leiper*, 2 Yerg., 193.
Farnum v. *Brooks*, 9 Pick., 242–4.
Bond v. *Hopkins*, 1 Scho. & Lef., 428.
Henry Co. v. *Winnebago Co.*, 52 Ill., 300.
Smith v. *Railroad Co.*, 99 U. S., 498.
Boyle v. *Jocharie*, 6 Pet., 648.
Clark v. *Smith*, 13 Id., 195.
Ex parte McNeal, 13 Wall., 236.
United States v. *Thompson*, 98 U. S., 486.
Cowles v. *Mercer Co.*, 7 Wall., 118.
Railway Co. v. *Letson*, 2 How., 497.
Story's Equity Juris., 12th ed., Sec. 1521, et seq.
Brown v. *County of Buena Vista*, 95 U. S., 158.
Brookshank v. *Smith*, 2 Yonge, Coll., 68.
McIntosh v. *Saunders*, 68 Ill., 128.
Angell on Limitations, Sec. 30.
Kane v. *Bloodgood*, 7 Johns, Ch. R., 111–134.

POINT 8.

If there be a conflict between the decisions of the State Court and those of the United States Supreme Court, in the administration of the doctrines of equity, the Courts of the United States will be governed exclusively by the rules which prevail in their own system of jurisprudence.

Payne v. *Hook*, 7 Wall., 430.
Noonan v. *Lee*, 2 Black., 509.
Township of Pine Grove v. *Talcott*, 19 Wall., 677.
Flagg v. *Mann, et al.*, 2 Sum., 544.
Neves, et al., v. *Scott, et al.*, 13 How., 272.
Boyle v. *Zacherie, et al.*, 6 Peters, 658.
U. S. v. *Howland*, 4 Wheat., 115.

This rule applies to statutes of limitation, for they relate to the remedy, and not to the obligation. The rule also applies to trusts and equitable liens, which are confessedly the creatures of equity.

Smith v. *Railroad Co.*, 99 U. S., 398.
U. S. v. *Thompson*, 98 U. S., 486.
Cowles v. *Mercer Co.*, 7 Wall., 118.
Railway Co. v. *Letson*, 2 How., 497.

It is admitted that the several States have power to establish *rules of property* to govern the transfer of real estate. But while this doctrine is freely admitted, it is utterly denied that the legislatures or the courts of the several States have any power whatever to deprive the Courts of the United States of the authority to administer in all the States alike, irrespective of their legislation and decisions, the well-established doctrines of equity jurisprudence. If one State has power to prevent the Courts of the United States from enforcing a vendor's lien, another State may forbid those Courts to exercise jurisdiction in cases of fraud, mistake or foreclosure, and thus the whole system of national equity be broken up and destroyed. In the absence of a statute of the United States, limiting the time for bringing suits in equity, they will be governed exclusively by the doctrine of laches, which they apply on equitable principles.

POINT 9.

The alleged failure of title as to ten acres of the land constitutes no defence.

In case of a partial failure of title, there will be an abatement of the purchase money, such as equity may require.

Officer v. *Murphy*, 8 Yerger, 502.

The doctrine of compensation in such a case is firmly established.

Frye on Specific Perf., Sec. 791, and notes.
Ibid., 795, 796, 801, 860.
Story Eq. Juris., Sec. 794.
Morgan v. *Smith*, 11 Ills., 194–201.

The practice is to refer the question to a master, who will report on the state of the title and recommend such a deduction as may seem just.

Hence, if the title to the ten acres should be shown to be defective, this would constitute no defence to the suit, but would merely give a right to an allowance on taking the account sought by the bill of complaint.

The title of the grantor, except as to ten acres, is admitted. (Record 63.) It is also admitted that the rents and profits of the land exceed the amount of the payment made on its purchase. (Record 12.) The question of title to the ten acres is in dispute. That question can be settled on reference to the master, and if the title has failed, an abatement of the price may be allowed, according to the settled practice of the Court. Authorities cited below.

The evidence fails to show that the ten acres were lost under paramount title. The judgment under which the tract was claimed, was not a lien upon the land. But if it had been the

payment of $189.20 would have discharged it (Record 62), and in equity, this would be all which the county could properly claim.

Tufts v. *Adams*, 8 Pick. 547.

POINT 10.

The bill may present a case in the alternative, and seek either to enforce the contract or to cancel it and have an accounting of the rents and profits, and a reconveyance of the land.

Frye on Specific Performance, p. 311, Sec. 707.
Lingan v. *Henderson*, 1 Bland, (Md.) 236.
Mills v. *Metcalfe*, 1 A. K. Marshall (Ky.) 477.
Crary v. *Smith*, 2 Comstock, 60.

POINT 11.

Complainants never had a remedy at law.

The original agreement for the purchase of the land was *literally* performed by making the original payment, and delivering the notes and mortgage to the vendor. Hence that agreement could not properly constitute the basis of an action at law.

At law the compliance of the county with the agreement of purchase was complete. The suggestion that there was a remedy at law for the recovery of the purchase money, on the ground that the notes and mortgage were void, is a mere delusion. The idea of any such remedy was never entertained until long after the statute of limitations had rnn against it. The original mistake of the parties extended to such a remedy, if it had any existence.

At law, the conveyance of the land to the county was absolute. The acknowledgment of a receipt of the purchase money

under seal, was likewise absolute. *At law* the notes and mortgage have no validity. Hence no tribunal but a court of equity could give adequate relief.

But the grounds of jurisdiction in the present case are numerous. They are as follows:

a. The express *trust* set forth in the notes and mortgage.

b. That "mere creature of a court of equity," a *vendor's lien* for the purchase money, to be enforced as a substitute for the notes and mortgage.

c. The mutual *mistake* of the vendor and the vendee, in regard to the securities given and received.

d. The *specific performance* of the agreement to pay for the land; or the *rescission* of the agreement for nonperformance on the part of the county.

e. The *fraud* of the county in holding the land after discovery of the mutual mistake, and refusing to pay the balance of the purchase money.

Having jurisdiction of the subject matter of the suit on any ground, the court will retain that jurisdiction and administer complete and adequate relief. It may annul the contract and decree a surrender of the property, or it may enforce a vendor's lien as a substitute for the original legal remedy, of which the complainants were deprived by the mutual mistake of the parties; or otherwise adminster justice between the parties.

LEADING AUTHORITIES FOR APPELLANTS.

We subjoin the following condensed report of the leading authorities on which appellants depend, conveniently classified:

(a) *The Vendor's Lien.*

(b) *The county cannot withhold the money, and retain the land.*

(c) *The mistake a ground for relief.*

(d) Complainants are not barred by any limitation, nor by delay.

a. *The complainants are entitled to the enforcement of the Vendor's Lien.*

1. *Moreton* v. *Harrison*, 1 Bland (Md.), 499. Bland Ch.—A. D. 1828.

The equitable lien, in favor of a vendor, is to be found classed in all the books with mortgages. It is, however, not precisely the same in all respects as an ordinary mortgage, given as a security for a loan of money; but it is a specific lien, in most respects so strongly analogous to the specific lien of a common mortgage, that they have been almost altogether regulated by the same principle of equity. But these securities—neither the incident nor the express lien as by mortgage—should not be confounded with mere personal securities or obligations for the payment of money of any class or grade whatever. Consequently, the Statute of Limitations in relation to bonds and simple contracts for the payment of money, can have no sort of application to this case. This equitable lien is so far a mortgage that the limitation, or presumption of satisfaction arising from

the lapse of twenty years, as applicable to ordinary mortgages, in like manner furnishes evidence or a presumption that such equitable lien has been satisfied or discharged. An equitable lien is founded upon a principle that the legal title has not been parted with, or ought not to be considered as completely vested in the vendee until the whole purchase money has been paid; because it is deemed unjust to consider any one as the absolute legal owner of property he has purchased, but has not paid for.

In this case, a delay of thirty years was held satisfactorily explained by the circumstances; and the fact that the defendant evasively answered the question whether he had paid the purchase money, and did not plainly say that it had been paid, was one of the grounds of the decision against him.

2. *Maple* v. *Kussart*, 53 Penn. St., 352. Strong, J.—A. D. 1866.

It is a maxim of common honesty, as well as of law, that a party cannot have the price of land sold and the land itself. Accordingly, it has been ruled, uniformly, that if one receive the purchase money of land sold, he affirms the sale, and he cannot claim against it, whether it was void or only voidable.

3. *Boos* v. *Ewing*, 17 Ohio (Griswold), 520. Birchard, C. J.—A. D. 1848.

That the lien exists, under certain circumstances, is as well established as any other principle of law.

Tiernan v. *Beem*, 2 Ohio Rep., 383.

When it obtains, the vendee is treated as a trustee for the vendor, for so much of the purchase price as remains unpaid, and the lien is binding upon the vendee, his heirs, and others

acquiring title, with notice of the equity. * * * "I am aware," says the Chief Justice, "that numerous *obiter dicta* may be found to sustain the notion that an attempt to secure the vendor's lien by a mortgage on the estate sold, is a discharge of the lien itself, yet I have never seen, nor do I ever expect to see, a well considered case expressly deciding that naked point." It seems impossible that such a decision can be based on solid grounds. * * * A mortgage taken as this was, is not a substitution. * * Nor is it a waiver.

4. *Relfe* v. *Relfe*, 34 Ala., 504. Walker, C. J.—A. D. 1859.

The lien of a vendor and of a mortgagee are alike—in the same sense and to the same extent—an incident of the debt. They are alike transferred by the assignment of the debt; and neither can survive the extinguishment of it; and the vendor and the mortgagee alike have independent remedies by taking possession and by proceeding in chancery for a sale to pay the debt. The decision of this Court is supported as well by authorities as by principle. * * * *For the vendee is regarded as holding under the vendor; and if his possession is the possession of the vendor,* * * * *it would be a violation of all precedent and principle to allow the acquisition of title by lapse of time. It would be like making lapse of time the origin of title in the tenant against his landlord.*

b. *The county cannot hold both the money and the land.*

1. *Pursley* v. *Hays*, 17 Iowa, 312. Dillon, J.—A. D. 1864.

Certain minors, after attaining majority, sought to impeach

a guardian's sale. The Court said: If, as set forth in the answer, the plaintiffs, after they attained their majority, with full knowledge of all the facts in regard to the sale, that is, with full knowledge of its alleged validity and of their rights, elected to receive, and still retain the money which was the produce of said sale, it would indeed be most strange if the law would permit them to have both the land and the purchase money.

So in the present case, the county, with full knowledge of the invalidity of the notes and mortgage, elected to keep, and has ever since retained the land. Such conduct may be held in equity to be an election to pay for the property.

2. *Deferd* v. *Mercer*, 24 Iowa, 118. Dillon, C. J.—A. D. 1867.

That the parties are not entitled to and cannot have both the money and the land, is a proposition which seems too plain to require either an extended argument or authority to show. We have so held in a former case arising upon the same sale.

Pursley v. *Hays*, 17 Iowa, 310.

3. Equitable estoppels of this character apply to infants as well as adults; to insolvent trustees and guardians, as well as persons acting for themselves; and have place, as well where the proceeds received arise from a sale by authority of law as where they spring from the act of the party.

Com. v. *Sherman's Admr's*, 18 Pa. St., 343.
Crowell v. *McConkey*, 5 Barr., 168.
Wilson v. *Begger*, 7 Watts & Serg., 111.
McPherson v. *Cunliff*, 11 Serg. & R., 426.
Benedict v. *Montgomery*, 7 Watts & Serg., 23.
Stroble v. *Smith*, 8 Watts, 280.

4. *Chilton* v. *Braiden's Adm'x*, 2 Black., 461. Grier, J.—A. D. 1862.

When one person has got the estate of another, he ought not, in conscience, to be allowed to keep it, without paying the consideration. It is on this principle that Courts of Equity proceed as between vendor and vendee. The purchase money is treated as a lien on the land sold where the vendor has taken no separate security.

The decree did not condemn the defendant to pay the consideration out of her separate estate, but orders the house to be sold to pay the purchase money, unless before a certain time, the defendant shall pay the amount due.

So in this case, the county should be ordered to surrender the land and account for the profits, unless, by a day to be fixed, it shall pay the purchase money and interest.

5. In *McMurtry* v. *Brown*, 6 Neb., 368. Maxwell, J.—A. D. 1877. Citing *Warmsley* v. *Crook*, 3 Neb., 352, the Court say: "The receipt of the purchase money with the knowledge that the purchaser is paying it upon the understanding that he is purchasing a good title, touches the conscience and binds the rights of the parties as effectually in a void, as in a voidable sale. It is proposed to retain the fruits of the agency and deny the authority of the agent. This cannot be done."

6. *Tredgill* v. *Pintard*, 12 Howard (U. S.), 24 McLean, J. —A. D. 1851. The Court say: The purchaser entered into the possession of a valuable property, and, *if he desired to rescind the contract, it was incumbent on him to relinquish the possession of the quarter section and claim the cancelment of the contract. He cannot avail himself of the benefit of the contract*

and resist a performance of it on his part. In this case a deduction was made for a deficiency of a few acres.

7. That the county is estopped to claim the land, while it repudiates the contract, also see the following cases:

Whitewell v. *Warren,* 20 Vt., 450.
Steam N. Co. v. *Weed,* 17 Barb., 378.
Chicago &c. v. *Crowell,* 65 Ills., 453.
Bradley v. *Ballard,* 55 Ills., 413.
R. R. Co. v. *Howard,* 7 Wall., 413.

c. *There is a clear right to relief on the ground of mistake.*

The following authorities sustain this ground of relief, as set up in the bill of complaint:

Story's Equity, 12th Ed.

"Where the result of denying relief will be to give the other party an unconscionable advantage and the fact of *misapprehension* is admitted or proved to the entire satisfaction of the Court, it would be strange, if it were not a sufficient ground for equitable interference. The denial of relief in such cases would seem to be at variance with the long established doctrines of Courts of Equity, and a reproach to the law itself." (Sec. 138, c.)

"The rule that an admitted or clearly established *misapprehension of the law* does create a basis for the interference of courts of equity, * * * will be found not at variance with the best considered and best reasoned cases upon the point, both English and American." (Sec. 138, e.)

"No jurist of eminence or judge of enlarged knowledge and

experience has yet been able to lay down any more restricted rule upon the subject." (Sec. 138, f.)

The American Courts have frequently granted relief for mistakes of law, or avowed a willingness to do so. (Note p. 134.) See also *Hopkins* v. *Mazyet*, 1 Hill, S. C., 172; *Lowndes* v. *Chisholm*, 2 McCord, S. C., 455; *Evarts* v. *Strode*, 11 Ohio, 486; *Harvey* v. *Charles*, 45 Mo., 159; *Savings Bank* v. *Insurance Co.*, 31 Conn., 529; *Fitzgerald* v. *Peck*, 4 Littell, Ky., 127; *Jones* v. *Munroe*, 32 Ga., 188.

"The English courts evidently regard with favor this branch of equity jurisprudence. (Sec. 138, g.)

2. Kerr on Fraud and Mistake, 396 *et seq*: "Mistake is a ground for relief in equity. Mistake may be said to be some unintentional act, omission or error, arising from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence. There is a mistake, if a man through ignorance, be induced to do a thing which he would not have done had he not been in error."

"The rule that mistake in matter of law cannot be admitted as a valid excuse, either for doing *an act prohibited* by the law or for an omission of a duty *which it imposes*, is common to all systems of law." (p 396.)

"If a man, through misapprehension or mistake of the law, parts with or gives up a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief, if, under the general circumstances of the case, it is satisfied that the party benefited by the mistake, cannot in conscience, retain the benefit or advantage so acquired." (p. 398.)

"Whatever may be the case, a court of equity may grant relief according to the circumstances." (p. 400.)

3. Bispham's Principles of Equity, p. 240: "A mistake exists when a person, under some erroneous conviction of law or fact, does, or omits to do some act which, but for the erroneous conviction, he would not have done or omitted. It may arise either from unconsciousness, ignorance, forgetfulness, imposition or misplaced confidence. Where the mistake arises from imposition or misplaced confidence, relief may be had on the ground of fraud."

Page 243: "Relief is sometimes given also in cases of surprise—that is, where parties have entered into arrangements unadvisedly and improvidently, and without due deliberation. So also in some cases where the law is confessedly doubtful, and one about which ignorance may well be supposed to exist."

4. *Pool* v. *Docker*, 92 Ill., 509: "Correction of mistake in any transaction is a principal head of equity jurisdiction."

5. *McKelway* v. *Armour*, 2 Stock., N. J., 115: One Redmond owned a large tract of land and conveyed a part of it to Armour. He shortly afterwards conveyed another part of it to Cook, who conveyed it to McKelway. The latter erected a valuable house, after which it was discovered that the description in the deed to Armour covered the ground on which the house had been built, and that McKelway had, in fact, built his house on land previously conveyed to Armour, and he filed a bill praying that the deed to Armour be so reformed as to exclude the lot on which the house was built, and to include in its place another lot of the same dimensions adjacent thereto; or that Armour be decreed to take the improvements, on equitable terms. The Court held that McKelway was most to blame, because a diligent examination of the deed to Armour and an actual measurement of the land would have decided the difficulty;

yet the relief asked for was decreed, and Armour was given twenty days, in which to elect whether he would purchase the improvements, or sell the ground, taking the other lot in its place.

6. *Beardsley* v. *Knight*, 4 Vt., 481, and 10 Vt., 190.

An action at law was brought on a supposed conveyance which had been excluded as evidence by the lower Court on the ground that it was not properly sealed, and therefore did not constitute a legal conveyance. The Supreme Court (4 Vt., 479) held that the supposed conveyance was rightly excluded, and that there was no remedy *at law*. The plaintiff then filed a bill for relief, alleging that the seals were omitted by mistake. The Court said (10 Vt., 190), "A court of equity will always correct mistakes, * * * and in no case have the Court refused to interfere where the mistake was undeniably proved." The case was continued, with direction to join certain heirs for further proceedings in conformity with the views of the Court.

7. *Jones* v. *Munroe*, 32 Ga., 188.

An agreement had been made by Munroe to compromise a certain lawsuit. This was done under the advice of counsel, and his belief that a certain decision rendered in a certain other case by the Supreme Court, was, in fact, the law of the State. It was afterwards discovered that a later decision had been given in still a different case, which practically over-ruled the first. A bill was then filed on the ground of mistake, to set aside the agreement, and restore the parties to their former position and rights, in which bill it was alleged that "the agreement was made under a mistake and an honest misapprehension of complainant's legal rights."

The Court granted the relief prayed for, saying: "It was an entire and thorough mistake of law."

8. *King* v. *Doolittle*, 1 Head., Tenn., 85.

A contract was made respecting the transfer of certain property, which was in accordance with a supposed copy of a charter. It was afterwards discovered that the supposed copy omitted important provisions of the real charter. A bill for relief on the ground of mistake was filed.

In regard to mistake in law, the Court says: "If a contract is entered into in good faith, by which it is mutually understood and intended, that for an adequate consideration, the one party shall part with, and the other acquire a valid title to property, and it turns out that at the time of the contract, by the operation of some settled principle of law, of which they were alike ignorant, the supposed title was wholly valueless, or did not exist in legal contemplation; in such a case, the mistake is not a mere mistake of law, it involves in some measure a mistake of fact, as well as of law." The contract was rescinded, and the defendant ordered to re-deliver the notes given by complainant, and refund the amounts paid on account of the notes, with interest.

9. *Harrell* v. *DeHormandie*, 24 Tex., 125.

The plaintiff sold certain securities for $830, believing that sum to be the full value thereof, which was accepted by defendant, with the belief that the full value was being paid. It was afterwards discovered that in computing the value, a mistake had been made by which plaintiff lost possession of $670 worth of property, for which nothing was received, the securities being in fact worth about $1500.

The Court held it "such a case of mutual error, mistake and surprise, as is appropriately and ordinarily a ground of relief in a court of equity."

10. *Irick* v. *Fulton*, 3 Gratt., Va., 196.

The complainants sold to defendant their interest in certain property, after which it was discovered that the interest was much larger than was believed at the time of making the conveyance. A bill was filed, on the ground of mistake, to cancel the deed, upon repayment of the purchase money. The Court granted the prayer of the bill.

11. *Whelen's Appeal*, 70 Penn. St., 425.

An heir had settled her interest in a certain estate, and afterwards, on the ground of mistake, filed a petition for review. The Court said: "It is clearly settled that where, with a mistake of law, there are found mixed up other ingredients * * * * concealing that which ought to have been made known; * * * * * or surprise is established, relief will thus be afforded to one who has been imposed upon, and induced to do that which is contrary to equity to maintain;" and, "that when a party has acted under a misconception or ignorance of his title, and has executed an agreement or conveyance to his prejudice, he will be relieved in equity."

12. *Cook* v. *Sumner, etc., Co.*, 1 Snead. Tenn., 716.

This case involved the legality of certain bonds, and a contract under which the company agreed to accept them. The Court said: "The complainants cannot be repelled upon the ground of ignorance of law. This principle is not applicable to the case for several reasons; because from the simple statement

of the facts, one of two conclusions is inevitable: either that the contracting parties mutually labored under gross ignorance of the law, or that the complainants were circumscribed by misrepresentations, or concealment, or misplaced confidence; and upon either assumption the complainants would not be precluded from relief."

13. *Evarts* v. *Strode*, 11 Ohio State, 480.

An instrument was accepted with the belief that it might be enforced, and that there was a complete remedy upon it. Such was not the case, and a bill was then filed for relief from mistake. The Court held that "the presumption that every man knows the law—the principle on which some of the cases are founded—should be permitted to be rebutted by proof, and relief granted against a mistake of law." The Court below had sustained a demurrer to the bill, which judgment was reversed by the higher Court.

14. *Harney* v. *Charles*, 45 Mo., 159.

The question was, whether a tender made under a special law, which was afterwards declared unconstitutional, could be amended, the time of making such tender under the general law having elapsed. It was claimed by the defense that this could only be done on the assumption that equity would relieve against mistakes of law. The plaintiff was allowed to amend the tender, so as to conform to the general law. "It must be understood that we hold that chancery will interfere in ordinary cases to relieve a party from his legal mistakes."

15. Hunt v. *Rousmaniers*, Admr's, 8 Wheat., U. S., 11.

The Court said: "In this case there is no ingredient of fraud. Mistake is the sole ground on which the plaintiff comes into court, and that mistake is in the law. * * * In general, the mistakes against which a Court of Equity relieves, are mistakes in fact. The decisions on this subject, though not very distinctly stated, appear to be founded on some misconception of fact."

"Although we do not find the naked principle, that relief may be granted on account of ignorance of law, asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity." (p. 215.) "We are unwilling, where the effect of an instrument is acknowledged to have been entirely misunderstood by both parties, to say that a Court of Equity is incapable of affording relief." (p. 216.)

On a second hearing of this case (1 Peters, 1), the relief was denied on the ground that it would practically substitute one set of securities for another of different kind.

16. Story's Equity, 12th Ed., p. 139.

"Ignorance of foreign law is deemed to be ignorance of fact, because no person is presumed to know the foreign law; and it must be proved as a fact." See also

Kerr on Fraud and Mistake, p. 402.
King v. *Doolittle*, 1 Head., Tenn., 85.
Sampson v. *Mudge*, 13 Fed. Rep., 260.

It is settled law in this sense that the States of the Union are regarded as foreign to each other.

17. Snell v. *Insurance Co.*, 98 U. S., 90.

The United States Supreme Court says: "It may be said that the mistake made out, was a mistake of law, and therefore, not relievable in equity. It was stated in *Hunt* v. *Rousmanier*, 1 Pet., 1, as a general rule, that mistake of law is not ground *for reforming a deed*, and that the exceptions to the rule were not only few in number, but had something peculiar in their character. The Court, however, was careful to say that it was not its intention to lay it down that there may not be cases in which a Court of Equity will relieve against a plain mistake arising from ignorance of law. In the same case, (8 Wheat., 174) Mr. Chief Justice Marshall said that he had found no case in the books in which it has been decided that a plain and acknowledged mistake of law was beyond the reach of equity. In 1 Story, Eq. Jur., Sec. 138, e and f, Redf. Ed., the author, stating certain qualifications to be observed in granting relief upon the ground of mistake of law, says that the rule that an admitted or clearly established misapprehension of the law does create a basis for interference of Courts of Equity, resting on discretion, and to be exercised only in the most unquestionable and flagrant cases, is certainly more in consonance with the best considered and best reasoned cases upon the point, both English and American. The same author says: "We trust the principle that cases may and do occur where Courts of Equity feel compelled to *grant relief upon the mere ground of the misapprehension of a clear rule of law*, which has so long maintained its standing among the fumdamental rules of equity jurisprudence, is yet destined to afford the basis of many wise and just decrees, without infringing the general rule that mistake of law is presumptively no sufficient ground of equitable interference.

18. Louisiana v. *Wood*, 102, U. S. 295.

The city of Louisiana, in the State of Missouri, irregularly issued certain bonds, which were purchased under the belief that they were valid. They were afterwards repudiated by the city, whereupon Wood offered to return the bonds and demanded repayment of the several sums paid for them. This being refused, the present suit was brought to recover back the money so paid. Upon the foregoing facts the Court gave judgment against the city, with interest at six per cent. from the time the payment of interest on the bonds was stopped. (p. 297.)

Mr. Chief Justice Waite delivered the opinion and said:

* * * "It would certainly be wrong to permit the city to repudiate the bonds and keep the money borrowed on their credit. The city could lawfully borrow. The objection goes only to the way it was done. As the purchasers were kept in ignorance of the facts which made the bonds invalid, they did not knowingly make themselves parties to any illegal transaction. * * * The only party that has done any wrong is the city. (p. 289.) * * * While, therefore, the *bonds* cannot be enforced because defectively executed, the money paid for them may be recovered back. As we took occasion to say in *Marsh* v. *Fulton County*, 10 Wall., 676, the obligation to do justice rests upon all persons, natural or artificial. And if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." (p. 299.)

* * * The only contract actually entered into is the one the law implies from what was done, to wit: that the city would, on demand, return the money paid to it by mistake, and as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate

from the time the obligation was denied. That contract the plaintiffs seek to enforce in this action, and no other." Judgment affirmed.

19. In *Kennard* v. *George*, 44 N. H., 440. Sargent J. —A. D. 1863., the holder of a purchase-money note and mortgage, which had been held void in the previous cases of *Eaton* v. *George*, 40 N. H., 258, and 42 N. H. 375, brought a bill for the payment of the purchase money; or a decree in the nature of a foreclosure; or that the land might be set off to him; or that the conveyance might be reformed.

Held: "This seems a clear case of mutual mistake, where the instrument given and received was not such a one as the parties supposed and intended it to be. In such a case equity will interfere and reform the deed, and make it, what the parties, at the time of execution, intended to make it; and it makes no difference whether the defect is statutory, or at common law, or a failure in form, or a misapprehension of legal effect." Citing, *inter alia*, *Beardsley* v. *Knight*, 10 Vt., 185; *Comedy* v. *Marcy*, 13 Gray, 377; *Brown* v. *Glines*, 42 N. H., 160.

In this last case the Court say: "We are inclined to doubt if it would be in the power of a married woman to take advantage of a defect in her mortgage, without thereby avoiding the deed to herself."

Neither should Douglas county be permitted to repudiate its notes and mortgage, and still hold the land under the deed from Chapman.

d. *Statutes of Limitation do not apply, and complainants are not barred by Laches.*

The following authorities support and illustrate this point:

Bond v. *Hopkins,* 1 Schwales & Lefroy, 428.

Lord Redesdale delivered the opinion and said:

"The Statute of Limitations does not apply in terms to proceedings in courts of equity; it applies to particular actions at common law, and limits the time within which they shall be brought, according to the nature of these actions; but it does not say there shall be no recovery in any other mode of proceeding.

"Nothing is better established in courts of equity (and it was established long before this act), than that where a title exists at law and in conscience, and the effectual assertion of it at law is unconscientiously obstructed, relief should be given in equity; and that where a title exists in conscience, though there be none at law, relief should also, though in a different mode, be given in equity" (p. 429).

2. *Henry Co* v. *Winnebago Co.,* 52 Ill., 300.

Mr. Justice Walker delivered the opiniou and said:

"This was a suit in chancery, brought by appellants * * * * * to recover money received. * * A demurrer was filed to the bill, the principal ground being, that the cause of recovery did not accrue within five years before exhibiting the bill. On the hearing the Court below sustained the demurrer and dismissed the bill."

* * * "There are cases in which courts of equity will interpose to prevent the bar of the statute of limitations, as

in case of fraud, which has not been discovered until the statutory bar would ordinarily apply at law.

"The fact that the statute is positive in its terms, will not, under all circumstances, operate as a bar in equity. There are cases in which a court of equity will not permit the bar of the statute to be interposed against conscience, and it will supply and administer a remedy within its jurisdiction, and enforce the right for the prevention of a fraud. * * * For these reasons we think the Court below erred in sustaining the demurrer, and in dismissing the bill, and the decree is therefore reversed and the cause remanded."

3. *Smith* v. *Railroad Co.*, 99 U. S. 398.

"A, an alleged creditor of B, whose claim had not been established at law, filed his bill against the latter, averring him to be insolvent, and against C. a debtor of B, praying that the debt due from C be applied to the payment of that claim. There being no assignment to A, by B, of his debt against C, and no lien upon the funds in the hands of the latter, the bill could not be sustained."

In Kansas, "the law of procedure recognizes but two forms of action; one designated a civil, the other a criminal action. * * * The Circuit Court of the United States, of that district, has, nevertheless, full equity jurisdiction. The Federal courts have it to the same extent in all the States, and *State legislation cannot affect it. Boyly* v. *Jocharie*, 6 Pet. 648. The States, however, may create equitable rights, which those courts will enforce where there is jurisdiction of the parties and of the subject matter. *Clark* v. *Smith*, 13 id. 195; *Ex parte McNeal*, 13 Wall., 236."

4. *United States* v. *Thompson*, 98 U. S., 486.

This was a suit on an official bond, in which the statute of limitations was set up as a defence. The cause of action accrued prior to March 30, 1865. The suit was commenced December 6, 1875. The statutory limitation was ten years. The Circuit Court upheld the statute. Mr. Justice Swayne delivered the opinion, and said:

"The Federal Courts are instruments competently created by the nation for national purposes. *The States can exercise no power over them or their proceedings, except so far as Congress shall allow.*" Judgment reversed.

See also, *Cowles* v. *Mercer County*, 7 Wall., 118.
Railway Co. v. *Letson*, 2 How., 497.

5. Story's Equity, 12th ed., Sec. 1521.

"Courts of equity not only act in obedience and in analogy to the statutes of limitations, *in proper cases*, but they also interfere in many cases to *prevent the bar of the statute*, where it would be inequitable or unjust. Thus, for example, if a party has perpetrated a fraud which has not been discovered until the statutable bar may apply to it *at law*, courts of equity will interpose and remove the bar out of the way of the other injured party. *A fortiori*, they will not allow such a bar to prevail by mere analogy in suits in equity, where it would be in furtherance of a manifest injustice."

Sec. 1521, a, says: "The question often arises in cases of fraud and mistake, * * * under what circumstances and at what time the bar of the statute of limitations begins to run. In general it may be said that the rule of courts of equity is—the cause of action, or suit, arises when, and as soon

as, the party has a right to apply to a court of equity for relief. In case of fraud or mistake, it will begin to run from the discovery of such fraud or mistake, *and not before.*"

6 *Brown* v. *County of Buena Vista*, 95 U. S., 158.

In 1865 Brown obtained a judgment against the county for $6,259.32, on which judgment payments were made at various times. In 1873 the county filed a bill to enjoin the collection of the judgment on the ground that it was obtained by fraud, etc.

Mr. Justice Swayne delivered the opinion, and said:

"The power of a court of equity to relieve against a judgment on the ground of fraud, in a proceeding had directly for that purpose is well settled. The power extends also to cases of accident and mistake." (p. 159.)

"The statute of limitation * * * does not apply, because the fraud, if it existed, was not known sufficiently early. *The statute could run only from the time of the discovery.* But a court of equity applies the rule of laches according to its own ideas of right and justice. Every case is governed chiefly by its own circumstances. Whether the time the negligence has subsisted is sufficient to make it effectual, is a question to be resolved by the sound discretion of the Court." (p. 160). "The law of laches, like the principle of limitation of action, was dictated by experience, and is founded on a salutary policy." (p. 161.)

Brookshank v. *Smith*, 2 Younge, Coll., 68.

Mr. Baron Anderson said: "The statute does not absolutely bind Courts of Equity, but they adopt it as a rule to assist their discretion. In cases of fraud, however, they hold that *the stat-*

ute runs from the discovery, because the laches of the plaintiff commences from that date, or his acquaintance with all the circumstances. In this, courts of equity differ from courts of law, which are absolutely bound by the words of the statute. Mistake is, I think, within the same rule as fraud."

8. McIntosh v. *Saunders*, 68 Ill., 128.

Mr. Justice Sheldon delivered the opinion and said: "This was a bill in equity, filed March 3, 1869, for the correction of an alleged mistake in a deed executed some time in the year 1823." (p. 129.)

"It is insisted that relief should be refused because of the staleness of the claim and gross *laches* in instituting the suit. It is true that a considerable time has elapsed since the making of the deed, but this objection seems to be met by the circumstance of the recent date of the discovery of the mistake."

In case of fraud or mistake, the statute of limitations will begin to run from the time of the discovery of such fraud or mistake, *and not before.*" Decree affirmed. (p. 131.)

9. Kane v. *Bloodgood*, 7 Johns. Ch. R., 111–134.

In this case Chancellor Kent declares that those technical and continuing trusts which are not at all cognizable at law, but fall within the peculiar and exclusive jurisdiction of the Court of Chancery, are not within the statute of limitations.

In the same case he declares that a plea of the statute of limitations is no bar, where there are circumstances stated in the bill which take the case out of it, as an offer to account, an acknowledgment of the debt, a promise to pay, or to do what was right and just, or a promise to pay when assets came to hand,

unless the plea be accompanied with an averment or answer destroying the force of these circumstances. See the authorities cited by him, and his review of them; and in this connection read the testimony of Ex-Judge Wakeley, Mr. Poppleton and Mr. Maynard; and see how completely they state a case within the above rule. (Record pp. 26–33.)

10. Angell on Limitations, Sec. 30, and cases cited.

There are cases in which *Courts of Equity will interpose to prevent the bar of the statute of limitations;* for example, if a party has perpetrated a fraud which has not been discovered until the statutable bar may apply to it at law. That the enactment is positive, is not allowed to be used against conscience, and an equitable tribunal will supply and administer, within its own jurisdiction, a substitute for an original legal right of which a party has been fraudulently and unjustly deprived.

11. Reardon v. *Searcy's heirs,* 1 Littell (Ky.), 58. Curiam.—A. D. 1882.

It is barely necessary to inquire whether there exist such circumstances in the present case, notwithstanding the lapse of time, as are satisfactory to show that the obligation has never been satisfied, and that the appellant is entitled to the beneficial interest therein.

12. M. B. T. Bridge Co. v. *Vreeland,* 3 Green. Ch. R., (N. J.), 160. Pennington Ch.—A. D. 1842.

Mere lapse of time is not held from the examination of the cases to constitute a bar to relief, but may be explained.

In this case, the specific performance of a contract for the

conveyance of land, was decreed after the lapse oftwenty-three years, the vendee having been in possession.

13. Craig v. *Leiper*, 2 Yerger (Tenn.), 194. Catron, J.—A. D. 1828.

In this case, it was contended with great ingenuity, that in no case after the lapse of twenty years will a Court of Equity give a specific relief, and that insanity could constitute no exception to the general rule. The Court recognizes the rule, its propriety and policy, but hold that a person insane, and incapable of assent or dissent, is not liable to the charge of laches, or of sleeping upon his rights, and is, therefore, not affected by the lapse of time.

But the suit is, in fact, within the time allowed by the Nebraska statute, although it is demonstrated, as we think, that no statute of limitations can be held applicable to the present case; and that it is entirely immaterial what statutes of limitations exist, or what construction has been given to them; it may perhaps be well enough to point out the fact that there is in truth no statute of limitations which, even on the theory of defendant's counsel, can be applied to the present case. The suit, as above shown, is for the recovery of the land itself. Hence, if any statute of limitations were applicable, it would be a statute barring the recovery of land. But the contract of sale was made, and possession of the land delivered, March 5, 1859, at which time the limitation of such actions was twenty-one years. Neb. Code, 1867, p. 395. This limitation was reduced to ten years by the act of July 1, 1869; Neb. Code, 1873, p. 525.

But the county has obtained a decision that the notes and mortgage are *ultra vires* and void. It is thus estopped to set up, for its advantage, the existence of any credit upon the notes

and mortgage. It is estopped to deny that the whole purchase money was due and payable at the date of the contract of purchase. Its repudiation of the notes and mortgage must be held for the benefit of the complainants, to take effect by relation, as of the date of the contract of purchase. The county cannot have the advantage of the credit given by the notes and mortgage for the purpose of defeating the complainant's claim; while at the same time it repudiates the obligation of the notes and mortgage for the payment of the purchase money.

Thus the whole term of the ten year limitation had elapsed before the passage of the amendatory act, which by its express terms applies to mortgages. But a legislative act thus attempting to cut off all remedy, is void, under the Constitution of the United States, as an act impairing the obligation of contracts.

Sedgwick Stat. and Con. Law, 613, n.
Sohn v. *Waterson*, 7 Wall., 596, 599.

As a general rule, a statute of limitations is to operate *in futuro* only, and is not to be so construed as to affect past transactions. A retrospective effect will not be given it, unless it clearly appears that such was the intention of the Legislature, especially when it tends to produce injustice or inconvenience. Such an intention must be manifested by clear and unequivocal expressions. If it is left doubtful what was the real design, the statute must be so construed as to have a prospective effect only. *Thompson* v. *Alexander*, 11 Ills., 55, citing

Prince v. *U. S.*, 2 Gall., 204.
Whitman v. *Hapwood*, 10 Mass., 437.
Bruce v. *Schuyler*, 4 Gilm., 221.
Somerset v. *Dighton*, 12 Mass., 383.
Hooker v. *Hooker*, 10 Smedes & M., 599.

The doctrine of the highest authorities is, that in such a case the limitation must commence when the cause of action is subjected to the operation of the statute, unless the Legislature has otherwise provided.

Ross v. *Duval*, 13 Peters, 62.
Lewis v. *Lewis*, 7 How., 778.

14. But the limitation, if at all applicable, which is denied, did not begin to run till after the discovery of the mistake upon the promulgation of the Otoe County decision in 1871. For the settled doctrine of the highest authorities also is that no limitation can apply, nor laches be imputed, until the discovery of the mistake which compelled the suitor to seek relief in equity. There is not a word in this record indicating that any person connected with the case had any doubt concerning the validity of the notes and mortgage until 1868, and no convincing evidence of their invalidity till 1871. So that this bill, brought in 1877, was clearly within the statute if the act be applicable to the case. But the limitation, if applicable, did not begin in 1871, nor had it begun when this bill was filed, for Charles A. Ely became insane in 1862 and died in 1864, and William A. Ely, his son and heir, and the only complainant not suing in some representative capacity, was then a minor, and appeared in this case by his guardian. What could be more conclusive? The principle underlying all statutes of limitation, as well as the doctrine of laches in equity is, that after a long lapse of time a presumption arises that the obligation has been discharged, that the debt has been paid. In the case at bar, the answer of the county distinctly admits that the obligation has not been discharged, that the debt has not been paid. A Court of Equity will never favor the county

with a presumption of payment which the county itself admits has never been made.

THE NEBRASKA STATUTES OF LIMITATION.

General Statutes, 1873, p. 524.
Compiled Statutes, 1881, p. 531.

Sec. 2. The distinction between actions at law and suits in equity, and the form of all such actions and suits heretofore existing, are abolished, and in their place there shall be hereafter but one form of action, which shall be called a civil action. Sec. 6. An action for the recovery of the title or possession of lands, tenements, or hereditaments, can only be brought within ten years after the cause of such action shall have accrued. This section shall be construed to apply also to mortgages. [Took effect July 1, 1869.] *Note.* The prior statute of 1859 reads "twenty-one years." Sec. 7. Any person entitled to commence any action for the recovery of the title or possession of any lands, tenements, or hereditaments who may be under any legal disability when the cause of action occurs, may bring such action within ten years after the disability is removed, and at no time thereafter. [Amendment in force Sept. 1, 1873.]

Sec. 10. Within five years an action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment, [must be brought.] Sec. 17. If a person entitled to bring any action mentioned in this title, be, at the time the cause of action accrued, within the age of twenty-one years, or insane, every such person shall be entitled to bring such action within the respective times limited by this title, after such disability shall be removed.

CONCLUSION.

In conclusion, we respectfully ask this Court to hold that the errors assigned are well taken; and to reverse the decree of the Court below and remand the cause with directions to enter a decree in favor of the complainants, providing among other things, as follows:

1. That the complainants are entitled to the relief sought by their bill of complaint.

2. That the county may, within twenty days next after the entry of such decree, file in the cause its election to take the land and make payment therefor.

3. That in case such election shall be filed, the cause be referred to a master, for him to inquire and report the value of the rents, issues, and profits, use and occupation of the premises since the same went into the possession of the county. Also the present value of the premises whereof the title is admitted by the defendant. Also whether the title of the ten acres which is disputed, was good at the date of the conveyance to the county; and to what extent it has since been used and occupied by the county; and whether the county has been deprived of such use and occupancy; and if so by whose fault and for what space of time; and to what extent, if any, the complainants or any of them are at fault in that behalf, and ought to make compensation to the county.

4. That said Master do take and state an account between the parties, in which he shall charge said county with the value of the premises which it actually received and has held, together with the value of such use and occupation; and in which he

shall credit said county with the payment made by it when said land was conveyed to it, with interest thereon.

5. That the value of said premises shall, at the election of said complainants, be taken and fixed either at the date of the conveyance to the county, or at the date of the decree so to be entered, as said complainants may deem most beneficial to them: and that the balance to be shown by such account in favor of the complainants, be paid to them within some short time to be fixed by the Court.

6. That in case said county shall not file such election within the time aforesaid, it be required forthwith to surrender and deliver up to complainant, Heman Ely, as the executor of Charles A. Ely, or to his attorney, agent or successor, the premises in controversy; and that thereupon the cause be referred to such Master, for him to take and state an account between the parties, wherein he shall charge said county with the use and occupation of the land, and shall credit said county with the payment made by it and the interest thereon; together with the sum, if any, which he shall find ought to be allowed on account of the ten acres whereto the title is disputed; and shall thereupon find and report the balance of such account, the payment thereof to be enforced in due course, according to the practice of the Court.

Upon such an accounting, the county can have the full benefit of every claim made in its answer. For all material matters alleged by the county, and which are not in harmony with the case made by the bill, are material, not to the vital question in the case, whether the county is bound in equity to surrender the land, or to make payment therefor, but are only material to the minor details of the relief, to be settled in an accounting before

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Upon such an accounting, the county can have the full benefit of every claim made in its answer. For all material matters alleged by the county, and which are not in harmony with the case made by the bill, are material, not to the vital question in the case, whether the county is bound in equity to surrender the land, or to make payment therefor, but are only material to the minor details of the relief, to be settled in an accounting before

the Master. The county may have the right to recoup from the purchase money, the amount of an alleged loss of what is called the timber-lot. Had the answer been sufficiently clear and explicit on this point, the proper deduction, if any, might have been made with the assent of the complainants, without even a reference to the Master.

The county admits possession and receipt of rents and profits, and had the answer been sufficiently explicit in regard to their amount, the complainants might, if satisfied with its correctness, have accepted the statement, and avoided further delay or expense.

Finally, we respectfully submit that the case of the complainants is so just, and so free from fault, that nothing less than an absolute and impassable barrier should prevent the Court from awarding the relief they seek; and we also submit that the non-existence of any such barrier has been conclusively established.

C. C. BONNEY,
GEORGE WILLEY,
Counsel for Appellants.

OFFICE SUPREME COURT U. S.
FILED
JAN 4 1883
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

No. 143.

HENRY Z. CHAPMAN, ET AL, APPELLANTS,

VS.

THE BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY, APPELLEE.

BRIEF FOR APPELLANTS, IN REPLY

GEORGE WILLEY,
C. S. BONNEY,
OF COUNSEL.

CLEVELAND:
J. B. SAVAGE, PRINTER, FRANKFORT ST.
1882.

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THE BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY, APPELLEE.

BRIEF FOR APPELLANTS,

IN REPLY.

We respectfully submit that the authorities cited in our opening brief in support of its several propositions, do not seem to be reviewed or questioned by the learned counsel for appellee. And we follow his example by not extending this reply into any review, in detail, of the cases cited by him. The Court will compare and weigh the cases on either side better than counsel can do it.

At the same time, we would wish to record that nothing in the argument, however able, of the learned counsel for appellee, diminishes the confidence with which we respectfully submit

the propositions and authorities of our first brief to the consideration and wisdom of this Court.

It seems to be conceded that the County of Douglass has the land in question, but has never paid for it as it agreed to do. And no reason is urged in argument why such payment should not be made, unless some absolute and insurmountable legal barrier has intervened. It is to be presumed that the county, equally with complainants, would hope for such a determination by this Honorable Court as might leave the county free to pay what it honestly owes, and save itself the odium of a just debt repudiated.

The contract of purchase was made March 4, 1859. It stipulated for deferred payments and a mortgage to secure them. On the next day, March 5, 1859, the deed was executed by Chapman, and notes and a mortgage were given by the County.

On page 10 of appellee's brief, it is admitted, for the purposes of the argument, that if the notes are repudiated, the county "ought not to have the credit allowed by their terms." But that inasmuch as the credit was not secured by the notes, but by the contract, the consequence stated does not follow.

We cannot see that it makes any difference whether the agreement to purchase on time payments was attempted to be supplemented by notes or not. The case referred to, *Stewart* v. *County of Otoe*, 2 Nebraska, 177, holds that the county can give neither note nor mortgage. If it can give no note, providing, in its terms, for future payment with interest, how can it give a contract such as it did give for the same thing and bind the county? If the one be *ultra vires*, the other is, on the same principle. Hence, if the contract to pay at deferred times

with interest, was invalid, no right to credit arose, for obligations in such case must be mutual. Therefore, as claimed in our first brief, pp. 42–3, ten years had expired before the amendatory Statute of Limitations, fixing ten years instead of twenty-one, took effect. In any view, the case cited of *Terry* v. *Anderson*, could not apply, for the statute there expressly included existing causes of action, and allowed a period for their prosecution, neither of which is done by the Nebraska act of 1869.

But questions of the Statutes of Limitations are so fully discussed in our first brief, p. 36, *et seq.*, with cases cited, that we abstain from any renewed discussion of them. It merely occurred to us to point out as to the above claim made by counsel for appellee, that it presented a difference without a distinction; and to cite here *Kashonong* v. *Barton*, 104 U. S. R., 668, to show that even if the statute of 1869 could be held to apply in this case, a reasonable time would still be allowed for instituting proceedings, having in view all the circumstances of the claim. What the facts may be pertaining to the history of this demand, are contained in the record, which is brief, and about them there is no contradiction. These facts are, perhaps, collated with sufficient fullness in our first brief, p. 2. It may be added, however, that Charles A. Ely willed his property to Heman Ely and another, as executors, in trust for his wife and minor son. Heman Ely alone qualified and made demand, or rather, communicated with the County, in 1864. Suits to foreclose were begun and pending from 1868 to December, 1872, when the last bill was withdrawn by complainant. It seems that these voluntary dismissals were because of doubts whether the bills, in the name of the minor heir, by his guardian, should

not have been brought by Heman Ely, as trustee, in whom the legal title was discovered to remain, and because the Supreme Court of Nebraska held, in 1871, that notes and mortgage by a county were unauthorized in law. From December, 1872, to 1876, negotiations for adjustment were had, when the County finally repudiated. The year following, September 10, 1877, this bill was filed, the trustee and cestuis que trust, and Chapman properly joining. Perry on Trusts, Sec. 873.

In view of these facts—especially noting that these legal proceedings from 1868 to December, 1872, were prosecuted in the name of W. A. Ely, a cestui que trust, and a proper party complainant—was not this bill filed within a reasonable time as against any possible application of the statute of 1869?

Next, referring to the statutes in relation to the powers and duties of County Commissioners, and the rulings in the Otoe County case upon these statutes, as we find them in the brief of appellee, we suggest the question *as to when* moneys for poor lands are due and payable. It would seem doubtful as to whether they could purchase at all until the money was in hand to pay.

But if they could do this without funds as yet collected, and if, under the Nebraska decision, they could not agree as to any fixed time of future payment by notes and mortgage, they could do this, as we have attempted to show, under no other sort of contract. Then the question is, when are they to pay? When does any cause of action for the unpaid purchase money accrue?

An indebtedness, of course, at once arises, if any purchase on attempted credit or without funds can be recognized. But the Commissioners are "empowered from time to time, as they

shall see fit, to levy and collect a tax, not exceeding one per cent.," * * "and to appropriate the same to the purchase of land."

Now, is the payment of indebtedness demandable, or the county suable, until the tax has been collected, either by voluntary action on the part of the Commissioners or by compelled action? Would not the county be considered as holding the land in trust under a continuing statutory obligation to levy and collect and pay? And could any statute of limitations be interposed against granting under this bill, under its prayer for general relief, a decree to compel these Commissioners to perform their statutory duty?

Vide 32 Ohio St. Re., 236, where such proceeding is held not to be a civil action under the code, and not barred by the statute of limitations.

In this connection it is to be noted that Charles A. Ely became insane about the time of his purchase of the notes and mortgage (Nov. 29, 1860), and was adjudged insane and placed under guardianship Sept. 1, 1861. (Rec. pp. 4–63. Now it cannot well appear that prior to the purchase by Ely, any right or obligation rested on Chapman to institute proceedings to compel the Commissioners to levy, etc., whether the indebtedness carried time or not. Only one payment had matured, in case there was legal credit for four annual payments.

When, after this, any right of proceeding accrued to Charles A. Ely, he was incapacitated and so continued till his death, Sept, 30, 1864, when he was succeeded by his executor and trustee, and his widow and minor child, William A. Ely *cestuis que trust.*

Now, here was continuous incapacity, first of Charles A. Ely,

and then of William A. Ely, one of the *cestuis que trust*. William A. Ely was a minor when this bill was filed. He always was and is a necessary party to any proceeding against the county. Perry on Trusts, Sec. 873, *supra*. He may, if he chooses, sue during disability. Angell on Limitations, Sec. 195. And the minority, at the time of suit commenced, of one of several complainants, saves the rights of all.

24 Ohio St. Re., 572.

This saving, then, certainly enures as to the three instalments which matured *after* Ely's purchase and insanity, if it should not to the first instalment, and provided, of course, that credits ran for four years, as claimed by appellee.

Quite obviously, taking the bill in its claim for relief on account of the discovery of legal fraud or mutual mistake, discovered in 1871, or even as early as 1868, the minority of W. A. Ely at the time of such discovery and when the cause of action thus arose, would save the rights of *all* the complainants under the authority of the case above cited. 24 O. St. R., 572.

Again. The theory of the pleadings, and on which discussion has so far proceeded, has been that the notes and mortgage were absolutely invalid, and herein the foundation for the various claims of vendor's lien, relief from mutual mistake, rescision, etc., as presented in our bill and brief.

But if, in the opinion of this Court, the Otoe county decision be not good law, in its denial of the authority of the Board to make notes or mortgage; or if, treating that decision as sound, that case should be found distinguishable from this, in that the Otoe county case was a suit to compel the county to give a mortgage, while this case shows a mortgage actually given, and to which the principles of *Louisiana* v. *Wood*, cited by us

may apply, to wit: that a party may be estopped from retaining property and at the same time setting up invalidity in the obligations given for it—then we submit our mortgage may be effectual for us on the facts, notwithstanding the theory of the pleadings. In that view all the considerations urged as to the continuance for us of twenty-one years under the statutes in force in 1859 when the mortgage was given, and as to the incapacity of C. A. Ely, and the minorship of W. A. Ely, would be applicable. The barring of notes does not bar a mortgage. 11 O. St. R., 42.

If, on the other hand, the mortgage is to be disregarded as not valid for any purpose, either of enforcement or of estoppel on the purchaser from claiming to hold a purchase while repudiating as void the obligations given for it, then the contract was entered into under mutual mistake not discovered until within ten years of the filing of this bill. It was a substantial mistake. It substituted for mortgage security the credit of a county whose warrants were not then worth fifty cents on the dollar. And the warrants Chapman took were not paid for ten years, and then they were not paid, but bonded. Rec., pp. 59–60.

The Vendor's Lien. This has been fully presented by us and we leave it to the Court on the discussion already had and the authorities collated on either side. Incidentally, however, to suggestions made by appellee, we ought to notice, perhaps, that even if the taking of a mortgage on the whole property could be taken as a waiver of this lien (which is contrary to the authorities), certainly the taking by mutual mistake of an invalid mortgage could not be a permanent waiver. Nor could a knowledge of the statute as to how the County was to raise